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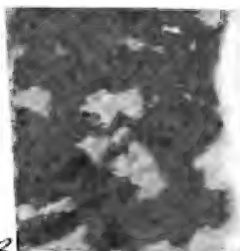
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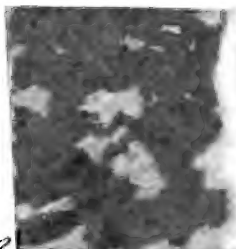
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R E P O R T S

OF

CASES,

DETERMINED

AT NISI PRIUS,

IN THE COURTS OF

QUEEN'S BENCH, COMMON PLEAS, AND EXCHEQUER,

AND ON THE

NORTHERN AND WESTERN CIRCUITS,

FROM THE

SITTINGS AFTER HILARY TERM, 7 WILL. IV., 1837,

TO THE

SITTINGS AFTER HILARY TERM, 7 VICT. 1844,

INCLUSIVE.

BY

**WILLIAM MOODY, Esq., OF LINCOLN'S INN,
AND FREDERIC ROBINSON, Esq., OF THE INNER TEMPLE,
BARRISTERS AT LAW.**

VOL. II.

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AND V. & R. STEVENS, AND G. S. NORTON,

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1844.

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CASES
 ARGUED AND DECIDED
AT NISI PRIUS
 IN K. B. & EXCHEQUER,
 AT THE SITTINGS AFTER
MICHAELMAS TERM,
 7 WILL. IV. 1836.

SITTINGS IN K. B. AFTER TERM AT
WESTMINSTER.

1836.

HUTCHINSON and Another v. BERNARD.

WESTMINSTER.
Dec. 1.

ASSUMPSIT.

This was an action for goods sold by the plaintiffs, English merchants, to the defendant at *Montreal* in *Canada*.

The defence was, that the goods were bought of the plaintiffs' factors in *Montreal* as principals, and that the defendant had a set-off against them.

For the defence the depositions of certain witnesses taken in *Montreal* were put in.

The witnesses were examined *vivâ voce* under a commission by order of the court of King's Bench, under 1 *W. 4. c. 22.*, directed to four commissioners, two on each side, or any two of them.

Illegal questions or answers returned by commissioners appointed by the court under 1 *W. IV. c. 22.* for the *vivâ voce* examination of witnesses, may be objected to and struck out at the trial; but counsel cannot object to the answers to illegal questions put on his own side.

1836.

 HUTCHINSON
 and
 ANOTHER
 v.
 BERNARD.

Sir *F. Pollock* objected to several questions as illegal, and to the answers returned as inadmissible evidence; he said that Lord Ellenborough had frequently struck out leading questions on the reading of interrogatories.

Cresswell. Certainly on interrogatories; but here each party had his own commissioner, and might have objected to the questions.

Sir *F. Pollock.* It does not appear but that that was done, and overruled by the commissioners.

PATTESON J. We are trying this cause by the rules of English law. If when the answer comes to be read it appears to be inadmissible as evidence, it may be struck out and not read, and so of any illegal questions. I believe that is the practice.

Sir *F. Pollock* objected to several questions and answers as illegal, and his Lordship, having a copy of the depositions before him, ordered many to be omitted by the officer.

Amongst other objections, Sir *F. Pollock* objected to an answer given to a question put on cross-examination of the defendant's witnesses.

Cresswell. The plaintiff has no right to object to an answer to his own question; the question is illegal, and if the party chooses to put it he must take the answer. If the witnesses were examined in court, a counsel could not thus object to the answer given to his own question.

PATTESON J. That is so ; if a party chooses to put the question, he must take the answer.

Verdict for the plaintiffs.

Sir *F. Pollock* and *Hoggins* for the plaintiffs.

Cresswell and *Wightman* for the defendant.

1836.

HUTCHINSON
and
ANOTHER
v.
BERNARD

ADJOURNED SITTINGS IN THE EXCHEQUER.

FRASER v. BERKELEY and Another.

WESTMINSTER.
Dec. 3.

TRESPASS for an assault and battery.
Plea, not guilty.

It was proved, on the part of the plaintiff, that the defendants had gone to his shop, and inflicted a grievous horse-whipping on him.

Thesiger, for the defendants, opened, that the plaintiff was the author of a work called "*Fraser's Magazine*," in which an article had appeared, grossly libellous on the defendants.

In trespass for a battery, the provocation, though not arising at the time of the battery, may be given in evidence under Not Guilty in mitigation of damages. *See Carter v. The Queen, 12 Q.B. 200.*

Erle objected that the defendants had no right to bring forward substantive grounds of complaint, for which an action might have been brought. The question has arisen in cross libels. Here the provocation alleged is totally distinct from the

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FRASER

v.

BERKELEY
and ANOTHER.

assault complained of: the defendants had no right to go out of the transaction itself.

LORD ABINGER C. B. The general rule is, that what amounts to a justification cannot be given in evidence under the general issue, but matters of mitigation may. Supposing the provocation to have taken place at the time of the assault, it is quite clear that it would be admissible; supposing the party assaulted had used words of provocation, such as calling the defendant a thief, that might be given in evidence. Now, can the circumstance of the provocation being distinct in point of time make any other difference than this; that the effect is lessened? that there has been time to cool? I cannot consider that the pretext for which the assault was committed is altogether unconnected with the complaint of a person suing for such assault.

The evidence was accordingly received.

Verdict for the plaintiff.

Erle, Kelly, and Talbot for the plaintiff.

Thesiger and Crowder for the defendants.

1836.

GUILDHALL,
Dec. 12.

PERRING v. HARRIS.

Antipen. v. Bignold -
11. d. J. C. P. 259 S.C. 3.
Man. C.
on the case, 9. 63.
In an action where special damage is alleged in the declaration and is essential to the maintenance of the action, such special damage may be traversed by the plea, and if not traversed is admitted.
Carling v. Evans.
11. d. J. C. P. 320.

CASE. The declaration stated that the plaintiff was an occupier of a house within the parish of *Greenford* rateable and entitled to be assessed for the relief of the poor of that parish; yet that defendant, being overseer of the poor, wrongfully and maliciously omitted to insert her name in the rate, *whereby* she was prevented from applying for and obtaining a licence to sell beer, &c. on her premises.

Plea, that the plaintiff was not entitled to be assessed, &c.

Issue thereon.

The plaintiff having given evidence to show that she was the occupier of premises in the parish which entitled her to be rated to the relief of the poor; that on those premises her father had been used to carry on the business of a victualler, and that she had made arrangements to carry on the same,

Kelly submitted, that the plaintiff must be called. If such an action be maintainable *at all*, it can only be on the ground of some special damage being sustained. Here the plaintiff has indeed alleged special damage, but has given no evidence of it; for, supposing her name had been on the rate, it does not appear that the magistrates would in their discretion have given her a licence.

Platt, contra, contended, that on these pleadings the special damage was admitted. If, as the defen-

1836.

PERRING
v.
HARRIS.

dant contends, the special damage be the gist of the action, he ought to have denied that special damage by his plea, just as in the case of slander for words actionable only by reason of special damage.

Kelly. It is not necessary ever to deny in pleading what is alleged simply by way of damage; it is for the plaintiff to give evidence of that, whatever the form of the plea may be.

LORD ABINGER C. B. said, It appears to me that the defendant ought to have denied the special damage if, as is admitted, that special damage goes to the foundation of the plaintiff's right of action; by merely traversing the title of the plaintiff, the defendant admitted some damage to have been sustained by her, supposing she has title.

Verdict for the plaintiff.

Platt and *W. H. Watson* for the plaintiff.

Kelly for the defendant.

CASES

ARGUED AND DECIDED

AT NISI PRIUS

IN K.B. and C.P.

AT THE SITTINGS AFTER

HILARY TERM,

7 WILL. IV. 1837.

SITTINGS IN K. B. AFTER HILARY TERM AT
WESTMINSTER.

1837.

DOE dem. WRIGHT and Another v. SMITH. WESTMINSTER,


*Feb. 2.
Case & Whitton v. Smith
7. Jan. 95.*

THE lessors of the plaintiff in this ejectment claimed as devisees of *Elizabeth Taylor*. The defendant had come into possession under a lease of *Elizabeth Taylor* to him, dated the 26th December 1829.

In order to prove the lease, *Erle* for the defendant produced what he called a counterpart, executed by the defendant, stamped with a 1*l.* 10*s.* stamp: upon looking at this instrument it appeared to have been executed by both parties, whereupon

A deed agreed to be admitted on a judge's order, made on a summons describing it as a counterpart, cannot be objected to at the trial as an original for want of the stamp as such, it being properly stamped as a counterpart.

*Wicks
H. P. King
C.B. 787.*

1837.

Doe
dem. WRIGHT
and ANOTHER
v.
SMITH.

Sir *W. Follett* objected that it was inadmissible, being an original lease and not a counterpart, and therefore it required a 2*l.* stamp, the rent being above 100*l.*

The defendant was bound by a judge's order to admit the document; and, in the notice requiring the defendant to admit it (and on which the order was founded), the document was described as "the counterpart of a lease from *Elizabeth Taylor* to the defendant, dated," &c.

Erle contended that under this order the defendant was precluded from saying it was not a counterpart.

Sir *W. Follett*. All that is admitted is, that the defendant executed the instrument produced when the order was made.

LORD DENMAN C. J. I think you have consented to admit it as a counterpart, and cannot now take this objection.

Verdict for the plaintiff.

Erle and *Manning* for the plaintiff.

Sir *W. Follett* and *Richards* for the defendant.

1837.



STOCKDALE v. HANSARD and Others.

WESTMINSTER,
Feb. 7.

CASE for a libel.

The declaration alleged that the plaintiff was a printer and publisher of learned and scientific works, and amongst the rest of a certain physiological and anatomical book, on the generative system, illustrated with anatomical plates; that the defendants published, in a certain book, purporting to be Reports of the Inspectors of Prisons of *Great Britain*, a certain libel, wherein the said book of the plaintiff was designated as "a work of the most disgusting nature," and the plates as "obscene and indecent in the extreme."

The order of the House of Commons for the publication and sale by certain booksellers of Reports laid before the House, does not exempt the booksellers from answering in an action of libel any individual injured by defamatory matters in such Reports so sold by them.

Pleas: 1st, not guilty; 2ndly, that certain persons were appointed under 5 & 6 W. 4. c. 38. to inspect certain prisons, and report thereon; that they inspected, amongst others, the prison of Newgate, that they there found the book in question, and made a report under the act, in which was contained the passage charged as libellous. The plea then averred, that the book so found was and had been published by the plaintiff, and was of a most disgusting nature, and the plates thereof obscene and indecent in the extreme.

Replication, that the book was not of a most disgusting nature, nor the plates in any manner obscene and indecent, and issue thereon.

The Report of the Prison Inspectors (purporting to be published by order of the House of Commons,) proved to have been purchased at the shop

1837.

 STOCKDALE
 v.
 HANSARD
 and OTHERS.

of the defendants in Pall Mall, was put in evidence by the plaintiff.

Sir *J. Campbell* A. G. for the defendants, after commenting on the indecent character of the plaintiff's book, contended that under the circumstances of the case the publication of the defendants was privileged, inasmuch as they had acted under the express orders of the House of Commons. . He referred to *Lake v. King*, 1 Saund. 120., 1 Lev. 240., *Rex v. Wright*, 8 T. R. 293., and read and commented on the judgment of Lord *Kenyon* in that case. He argued that this was in fact a proceeding of the House of Commons, and was distinguishable from the case of *Rex v. Lord Abingdon*, 1 Esp. 226. and *Rex v. Creevey*, 1 M. & S. 273.

It was admitted that the defendants sold the book, acting under the following resolutions of the House of Commons :—

“ *House of Commons,*
Jovis, 13th August 1836.

“ Resolved.—That the parliamentary papers and reports printed for the use of the House should be rendered accessible to the public, by purchase at the lowest price they can be furnished, and that a sufficient number of extra copies shall be printed for that purpose.”

“ *Resolutions of the Committee on Printing,*
Friday, March 18th, 1836.

“ 1st.—That the parliamentary papers and reports, and also the votes, and appendix to the votes,

should be sold to the public at the price of one halfpenny *per* sheet.

“ 2d.—That all charts, plans, or drawings which these papers may contain be charged at the rate of three-pence for each half sheet, or sixpence for each whole sheet of foolscap size, and one shilling *per* sheet of larger size.

“ 3d.—That papers of former sessions now remaining in store be sold at the same rate as those of the current session.

“ 4th.—That Messrs. *Hansard*, the printers to the House, be appointed to conduct the sale.

“ 5th.—That in order to render the parliamentary papers accessible to the public through the means of other booksellers, it is expedient that a discount of 12½ *per cent.* should be allowed to the trade who shall become purchasers.

“ 6th.—That the committee recommend that Messrs. *Hansard* should charge in their account the actual expense incurred by them in carrying on the sale, as proposed in the said resolutions.”

The resolutions were put in evidence by the defendants, and they gave evidence as to the character of the plaintiff's book.

LORD DENMAN C. J. in summing up, told the jury that the questions for their decision were, first, the fact of the publication of the libel in question, and whether it was injurious to the plaintiff.—Secondly, was this book of the plaintiff's of an indecent and obscene nature. If it was, they were to find their verdict for the defendants. His lordship then

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proceeded, On the third ground, which has been submitted to you, namely, that this is a privileged publication, I am bound to say, as it comes before me as a matter of law, for my direction, I entirely dissent from the law as contended for by the learned counsel for the defendants. I am not aware of the existence in this country of any body whatever, which can privilege any servant of theirs to publish libels on any individual. Whatever arrangements may be made between the House of Commons and any publishers whom they may employ, I am of opinion that the person who publishes that in his shop, and especially for money, which can be injurious, and possibly ruinous, to any one of His Majesty's subjects, must answer in a court of justice to that subject, if he challenges him for that libel. I wish to say so emphatically and distinctly, because I think, if, on this the first opportunity that has arisen in a court of justice on such a question, that point were left unsatisfactorily explained, the presiding judge might become an accomplice in the destruction of the liberties of his country, and expose every individual in it to a tyranny no man ought to submit to. I think the case quoted from the Term Reports on that subject is not applicable to the present ; it does not go so far as this, and it seems to me, that it is not in any respect capable of being urged as an authority to prevent my going the length I have just now stated. Therefore my direction to you, subject to question hereafter, is, that the fact of the House of Commons having directed Messrs. *Hansard* to publish all their parliamentary reports and papers, is no justification for them or any bookseller who publishes a par-

liamentary report, containing a libel against any man.

If however you think the book of the plaintiff is disgusting, and the plates obscene and indecent, then you will find for the defendants on their second plea.

Verdict for the plaintiff on first issue,
for the defendants on the second.

The plaintiff in person.

Sir *J. Campbell* A. G. and *Crompton* for the defendant.

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ADJOURNED SITTINGS IN THE COMMON PLEAS.

WESTMINSTER,
Feb 9.

ERNEST v. BROWN.

DEBT on an attorney's bill, with counts on an account stated and for money paid.

Plea, *nunquam indebitatus* as to all except 3*l.* 7*s.*, and payment into court of that sum on the second count. The plaintiff had a claim for 5*l.* for a cart sold, for which the sum of 3*l.* 7*s.* was intended to be paid into court; but upon the Lord Chief Justice looking at the record, there appeared to be no count for goods sold and delivered.

The record may be amended at Nisi Prius, by adding a count which was in the declaration and issue delivered.

Wilde Serjt. applied to amend the record by adding that count, according to the declaration and

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v.
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issue, and he called the plaintiff's attorney, who produced the declaration and issue remaining in his office, and said that those delivered to the defendant were copies of them.

TINDAL C. J., after argument, said, he thought the amendment ought to be made. The parties evidently came here prepared to try according to the issue which had been delivered.

The amendment was accordingly made.

Verdict for the plaintiff.

Wilde Serjt., Kelly, and Peacock for the plaintiff.
Alexander and J. Bayley for the defendant.

YORK,
March 16.

SPRING ASSIZES, 7 Will. IV.

YORK.

Coram PATTESON J.

REX v. ROBINSON.

The threatening to accuse under 7 & 8 G. 4. c. 29. s. 7. need not be a threat to accuse before a judicial tribunal, a threat to charge before any third person is enough.

INDICTMENT for extorting money by *threatening to accuse* the prosecutor of an unnatural offence. Second count, for extorting it by *accusing*, &c.

The prisoner accosted the prosecutor when he was alone, and after intimating to him that he and another person had seen him in the act of com-

mitting the offence alluded to, added " Well, Sir, " we don't want to say any thing about it, give us " our allowance money, and we will say nothing " about it." He was then asked by the prosecutor how much money he required, and answering five shillings, he received that money from the prosecutor.

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The prisoner having been found guilty,

Sir *G. Lewin* objected that the words proved to have been spoken by the prisoner did not amount to an accusation, or a threat to accuse, within the meaning of the act of parliament, 7 & 8 Geo. 4. c. 29. s. 7. The word " accuse " imported a charge made before a magistrate or some judicial tribunal ; if it were used in a larger sense, as extending to the case of a mere charge made to the prosecutor himself, there was no necessity to add the further terms " or threaten to accuse : " for, construing the word " accuse " in the larger sense, it would comprehend the second offence provided against by the act, viz. the " threat to accuse," inasmuch as the threatening to accuse was in itself charging the prosecutor ; he referred to *R. v. Fuller*. (a)

S. Temple for the prosecution. The legislature could not have intended to confine the protection of the act to the rare case of a charge made, or threatened to be made, before a judicial tribunal. It is to be observed also that the act is in its terms *declaratory*, and under the old law it was clear that

(a) Russ. & Ry. 408.

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extorting money by threatening to accuse the prosecutor *anywhere*, was a felony, *Rex v. Egerton.* (a)

PATTESON J. said that the objection ought in strictness to have been taken while the case was before the jury; it being their province, not his, to say whether the prisoner had extorted the money by threatening to accuse the prosecutor of an unnatural offence. His lordship however expressed himself to be clearly of opinion, that the words spoken by the prisoner did bring the case within the act. By the former law it was a felony to extort money by threatening to accuse the prosecutor to any third party; it was not necessary that the threat should be that of accusing by course of law; and the statute (7 & 8 G. 4. c. 29. s. 7.) being declaratory of the former law, could hardly be construed as less extensive in its operation: neither is it necessary to construe the term "accuse" in two different senses, as had been contended by the prisoner's counsel. The term "accuse," throughout the act, means to charge the prosecutor before any third person; and "threatening to accuse" means "threatening to charge before any third person." The conviction was therefore clearly right.

The prisoner was accordingly sentenced.

Temple for the prosecution.

Sir G. Lewin for the prisoner.

1837.

REX v. CROSSLEY.

YORK,
March 16.

INDICTMENT for obtaining money from the prosecutor by false pretences.

The indictment stated that the prosecutor had drawn a bill of exchange upon the prisoner for 2638*l.* which the prisoner had accepted; and that when it became due, the prisoner by falsely pretending that he was then provided with sufficient funds to pay the full amount of the bill, excepting 300*l.*, obtained the last-mentioned sum from the prosecutor, contrary to the statute, &c.

The facts of the case were, that the prisoner had accepted a bill, drawn on him by the prosecutor, for the sum of 2638*l.*, being the amount in which he was at that time indebted to the prosecutor. The bill was put into circulation, and when it became due the prosecutor became anxious about its being duly taken up by the prisoner, and applied to him on the subject, asking him whether he was prepared to pay it? The prisoner answered, that he was prepared with sufficient funds, all but 300*l.*, and that he expected to get the loan of that sum from a friend. The prosecutor expressed his willingness to advance the 300*l.* himself, and ultimately did so; but the prisoner, instead of taking up the bill, applied the 300*l.* to his own purposes, and suffered the bill to be dishonoured, and the

Obtaining, as a loan, from the drawer of a bill accepted by the prisoner and negotiated by the drawer, part of the amount, for the purpose of paying the bill, under the false pretence, that the prisoner was prepared with the residue of the amount,—is an offence within 7 & 8 G. 4. c. 29. s. 53., the prisoner being shown not to be so prepared, and not intending so to apply the money.

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Rex
v.
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prosecutor ultimately had to pay it. There was evidence also, that at the time the prisoner obtained the money he was not in possession of funds sufficient to make up the balance between the 2638*l.* and the 300*l.*, but was in insolvent circumstances.

Sir *G. Lewin*, for the prisoner, contended that the 300*l.* was not obtained by any thing amounting to a "false pretence" within the meaning of the act 7 & 8 *Geo. 4. c. 29. s. 53*. The prisoner's representation, that he could take up the bill if the 300*l.* were advanced to him, formed a mere mis-statement; at the worst, a naked lie: and if the prisoner had thereby subjected himself to be criminally prosecuted, there was hardly a merchant or tradesman who had not in the course of his business brought himself within the same charge: and he cited *Rex v. Wakeling*. (*a*) *Rex v. Coddington*. (*b*) Secondly, the money was not obtained *at all* within the meaning of the act: it was a mere *loan*, and it had never yet been decided that the statute extended to cases where the prosecutor had only lent, not parted with the property of, the goods or money.

PATTESON J. The words of this act are very general, and I do not think I can withdraw the case from the jury. If they are satisfied that the prisoner fraudulently obtained the 300*l.* from the

(*a*) R. & R. C. C. R. 504.

(*b*) 1 Carr. and P. 661.

prosecutor by a deliberate falsehood, averring that he had all the funds required to take up the bill except 300*l.*, when in fact he knew that he had not, and meaning all the time to apply the 300*l.* to his own purposes, and not to take up the bill, it appears to me that the jury ought to convict the prisoner. In the case *Rex v. Coddington*, it does not appear that the prisoner did distinctly allege that he had a good title to the estate which he was selling. Then as to the money being advanced by the prosecutor only as a *loan* ; the terms of the act of parliament embrace every mode of obtaining money by false pretences, by loan as well as by transfer. If the legislature meant to use the term in a more limited sense, it is to be regretted that they have not used language which can fairly have that effect.

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 Rex
 v.
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Verdict, not guilty.

Baines for the prosecution.

Sir *G. Lewin* for the prisoner.

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Coram ALDERSON B.

 YORK,
 March 17.
TODD *v.* HAWKINS.

A letter from a son-in-law to his mother-in-law, volunteering advice respecting her proposed marriage, and containing imputations upon the person whom she was about to marry, is a privileged communication, and not actionable unless malice be shewn.

LIBEL. Plea, General Issue, Not Guilty.

The defendant was the son-in-law of a widow lady to whom the plaintiff was paying his addresses; and the libel complained of was contained in a letter sent by the defendant to that lady; the letter charged the plaintiff with various acts of gross misconduct, and warned the lady against listening to his addresses. The letter requested her to make inquiries into the facts stated, and to act upon the result of those inquiries.

For the plaintiff it was insisted that the letter being a purely voluntary one on the part of the defendant, and not sent in performance of any duty imposed, or in compliance with any inquiry made of him by the lady, the communication could not be considered as a privileged one, and that there being no plea of justification, the plaintiff was clearly entitled to a verdict.

Cresswell, for the defendant, contended, that the near relationship between the parties, and the interest which the defendant might naturally be presumed to feel in the contemplated marriage between his mother-in-law and the plaintiff, was

itself sufficient to raise the presumption that the defendant acted *bonâ fide* and without malice.

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 HAWKINS.

ALDERSON B., in summing up to the jury, said, The question is whether the letter was written from malice operating upon the mind of the defendant. If no explanation were given of the circumstances under which it was written, the law would, from the contents, imply it to have been published with a malicious motive against the plaintiff. But here, it is shewn that the parties were standing in circumstances of confidence and near relationship towards each other, and I think that the defendant's conduct is justifiable, if he really believed in the truth of the statements which he made, though such statements were in fact erroneous. The whole question is, whether this is a *bonâ fide* letter : there are warm expressions, no doubt, in the letter ; but casual expressions should not induce you to find the defendant guilty, if he was really acting *bonâ fide* when he used them ; for it is for the common good of all that communications between parties situated as these were, should be free and unrestrained.

Verdict for the defendant.

Alexander and Wightman for the plaintiff.

Cresswell and Matthews for the defendant.

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 Cotam ALDERSON B.

Jen. Ryans. v. Osborne
D. J. 1139 - 22d J. C. P. 196.
J. Man. c. 62. 670.

YORK,
 March 17.

Phillips. v. Smith.
19. L. J. 184. 65.

Where a factor, the consignee of goods for sale and indorsee of the bills of lading, had landed and warehoused the goods and taken the wharfingers' certificates and dock-warrants in his own name, and then pledged the certificates and warrants for an advance of money on his own account; held, that such pledge was not protected by the second section of 6 G. 4. c. 94. in an action of Trover by the real owner of the goods.

CLOSE and Another v. HOLMES (registered Officer of the *Hull* Banking Company).

TROVER for some cream of tartar, brimstone, and argol.


Plea, (under the *Factor's* Act 6 G. 4. c. 94. s. 2.), that one *J. Hollingworth* was entrusted with and in possession of certain bills of lading, dock warrants, warehouse keepers' certificates, wharfingers' certificates, and warrants or orders for the delivery of goods therein mentioned (being the same goods as those mentioned in the declaration); that *Hollingworth* was thereby enabled to appear as owner of the said goods, and was believed to be so by the banking company, who had no reason to know or suspect that he was not the owner of them, and that he pledged them to the company, who made him advances on the faith of them.

2nd. (As to converting the argol) a plea under the 5th section of the statute, that *Hollingworth* had a lien on the goods for advances which he had made to the plaintiffs, and that he pledged them to the banking company for advances to be made by the company to him.

Replications. *De injuriâ.*

The plaintiffs were merchants at *Manchester*, having establishments also at *Naples* and other places

abroad. *Hollingworth* was a ship and insurance broker and commission agent at *Hull*; and the plaintiffs were in the habit of making consignments to him as their agent for sale.

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In *January* 1835 the ship *Francis* arrived at *Hull*, with some brimstone and cream of tartar on board, consigned by the plaintiffs to *Hollingworth* for sale on their account; the bills of lading being also transmitted to him indorsed by the shippers in blank. *Hollingworth* had the goods landed, and placed them in a bonded warehouse (*Hopwood's*), in his own name. In the following month another ship (*The Dean*) also arrived at *Hull* with some argol and more cream of tartar on board belonging to the plaintiffs, and consigned in like manner to *Hollingworth*; the bills of lading being likewise indorsed and transmitted to him as in the former instance: the goods *ex The Dean* were landed and placed by *Hollingworth* in his own name in the bonded warehouse of the *Hull* dock company. In *June* 1835 *Hollingworth* applied to the defendants' banking company for an advance of 500*l.*, for which he offered to lodge some goods which he said that he had on consignment, and that he had made advances on them. The banking company acceded to his application, and on the 17th *June* he obtained from the *Hull* dock company, and lodged with the banking company, an acknowledgment in writing that they (the dock company) held the argol and the cream of tartar *ex The Dean* to the order of the banking company, and thereupon the banking company paid his acceptance for 500*l.* In the month of *July* the banking company paid another acceptance of *Hollingworth* for 250*l.*, for which

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 v.
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he pledged with them a delivery order, accepted by *Hopwood*, for the brimstone and cream of tartar *ex The Francis*; but on neither occasion did *Hollingworth* pledge or produce to the banking company the bills of lading.

For the plaintiffs it was contended, in respect of the first plea, that the banking company must, under the circumstances proved in evidence, have known that the goods did not belong to *Hollingworth*; and *Evans v. Trueman* (a) was cited; and as to the second plea, it was denied that *Hollingworth* himself had any lien on the argol. But it was urged further, that even if the banking company acted *bonâ fide*, and under the belief that the goods were *Hollingworth's*, still the case was not within the act of parliament. (6 G. 4. c. 94.) That act only gave validity to pledges made by a factor of bills of lading and other documents of that nature, evidencing title, and with which the factor may have been entrusted by his principals. All the documents enumerated in the statute were of that description; but here the banking company made the advances on the faith of a mere delivery order in the one case, and of the warehouseman's acknowledgment in the other; neither of them being instruments with which his principals had entrusted him; but both of them instruments created by the factor himself for the very purpose of raising money.

For the defendants it was answered, that the documents pledged in this instance came within the meaning of the act of parliament, being "orders for

(a) 1 M. & Rob. 10.

the delivery of goods," and the factor was virtually entrusted with those documents by his principals, inasmuch as they entrusted him with the goods in specie, and with the bills of lading relating thereto, by which he might at any time arm himself with and make use of the delivery orders, &c.

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ALDERSON B. left it to the jury to say, whether the banking company, at the time they made the advances, were aware of the fact that the goods did not belong to *Hollingworth*: and whether *Hollingworth* himself had any lien on the argol, which he could transfer to the defendant under the 5th section of the statute. With regard to the other point, his lordship expressed a clear opinion that the statute gave validity only to pledges by a factor of documents with which the real owner had previously entrusted him, and that it did not extend to the pledge of documents created (as in the present instance) by the factor himself. He thought it right that the questions of fact should be left to the jury, but in the event of their finding that the banking company made the advances in ignorance that the goods were not the property of *Hollingworth*, he should still direct the verdict to be entered for the plaintiffs.

The jury found that the banking company knew that the goods were not the property of *Hollingworth*, and that *Hollingworth* had no lien on the argol, and there was consequently a

Verdict for the plaintiffs.

Cresswell, Cowling, and Martin for the plaintiffs.

Alexander, Wightman, and Tomlinson for the defendants.

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YORK.

Coram PATTESON J.

YORK,
March 18.

The KING v. CHAMPNEYS.

An insolvent debtor acquitted on a former indictment for omitting goods out of his schedule, may be again indicted for omitting other goods not specified in the former indictment; but such a course ought not to be taken except under very peculiar circumstances.

THE prisoner was indicted under the insolvent debtors' act (7 G. 4. c. 57. s. 70.), for fraudulently omitting certain goods and chattels, to wit, 10 chairs, 10 tables, 2 carts, &c., out of his schedule, presented and sworn to on his applying to be discharged under the act, in *October* 1835.

The prisoner now pleaded *ore tenus* that he was tried for the same offence at the last assizes, and acquitted.

The indictment upon which he was then tried was in substance the same as that to which he now pleaded, except that the two carts mentioned in the present indictment were not specified in the former one. It was however now submitted on his behalf that the two charges were substantially the same; the charge in each indictment was that the prisoner had fraudulently presented and sworn to a schedule which did not contain a true enumeration of his goods. The prosecutor had indeed now complained of certain chattels being omitted out of the schedule, which he had not specifically complained of in the former indictment: but that was the prosecutor's own fault, for the prisoner was prepared to shew that the prosecutor might have included those chattels in the former indictment. If the prosecutor could thus take the offence piece-meal, a separate indictment might be preferred for every

article of property that was not included in the schedule.

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Sir *G. Lewin*, for the prosecution, contended that as the former indictment did not charge the prisoner with omitting the *carts* out of his schedule, the plea of *autrefois acquit* could not avail so far as respected them.

PATTERSON J. I cannot say that the plea of *autrefois acquit* is, in strictness, a good defence to the whole of this indictment. The prisoner may have fraudulently omitted out of his schedule the goods mentioned in this indictment which were not mentioned in the last; and, in point of law, I think a prosecutor may prefer separate indictments for each such omission. But though the present indictment be in point of law maintainable, I cannot help saying that, excepting under very peculiar circumstances, I think such a course ought not to be pursued; and if the case goes on, I shall strongly advise the jury to acquit the prisoner, unless they think that the goods, now for the first time brought forward, were omitted out of the schedule under circumstances essentially different from the others.

On this intimation of the learned judge's opinion, Sir *G. Lewin* declined to proceed further, and there was an acquittal.

Sir *G. Lewin* for the prosecution.

Cottingham and *Robinson* for the prisoner.

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LANCASTER.

Coram PATTESON J.

LANCASTER,
March 23.

DOE dem. BAMFORD v. BARTON.

The declarations of an illegitimate member of a family respecting his illegitimate brothers are not admissible as reputation.

THIS was an ejectment to recover certain lands formerly belonging to one *Alexander Kershaw*. That person died seised in 1788, leaving several illegitimate sons, but no lawful issue; and by his will he devised the property to his illegitimate sons for life, with remainder in tail to their children, the remainder to his own right heirs. The devisees for life being stated to be now dead, without leaving issue, the lessor of the plaintiff claimed as heir at law of the testator.

In order to prove that *J. S.*, one of the illegitimate sons of *Alexander Kershaw*, was dead without issue, the counsel for the plaintiff called a witness, who stated that he was a son in law of (*X.*), another of *A. Kershaw's* illegitimate sons, (now dead) and that he had heard his father in law (*X.*) say that his natural brother *J. S.* had died many years ago without issue.

PATTESON J. expressed an opinion that this was not admissible evidence under the head of reputation.

Atcherley Serjt., for the plaintiff, said there was no case excluding the declarations of a person *de facto* member of the family on the ground that he was not legitimate, and the principle on which such

declarations were received in evidence (*viz.* the intimate knowledge which the declarant must be supposed to have of the state of the family) applied as strongly to an illegitimate as to a legitimate member of it, if it were shewn, as here it was shewn, that he was adopted into the family, and virtually formed part thereof.

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PATTESON J. The courts have not latterly been disposed to enlarge the exception in favour of declarations of this kind. The person whose declarations are now tendered in evidence was not, in point of law, a member of the family of his reputed father; and it would be opening a new and a wide door to such evidence if it were to be received merely because the party was living in habits of intimacy amongst those who were members of the family. I think therefore I cannot receive the evidence.

The evidence was accordingly rejected.

Verdict for the defendant. (a)

Atcherley Serjt., *Wightman*, and *Martin* for the plaintiff.

Cresswell, *J. Addison*, *Cowling*, and *J. Henderson* for the defendant.

(a) See *Johnson v. Lawson*, 2 Bingh. 86.

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LIVERPOOL.
Coram PATTESON J.

LIVERPOOL, HITCHEN v. TEALE, HELME, CUNNING-
April 3. HAM, and Two Others.

*Howard. v. Newton.
2. Nov. c. Feb. 509.*

In Trespass against several defendants, where upon proof of trespasses affecting different defendants, the counsel for the plaintiff elects to proceed on the trespasses affecting two only of the defendants, he cannot afterwards proceed (even as against those defendants) on other trespasses affecting all the defendants.—The defendants against whom the counsel abandons the case ought not to be acquitted till the special pleas in which they have joined are disposed of.

TRESPASS.

The declaration contained counts for breaking and entering a close of the plaintiff, and pulling down and destroying a weighing machine erected thereon, and also counts for assaults. The defendants pleaded the general issue, and several special pleas justifying the trespasses complained of.

Issue thereon.

The plaintiff proved two distinct acts of trespass by pulling down and destroying a weighing machine, once on the 5th *October*, (when only the defendants *Teale* and *Helme* were present,) and another some time afterwards, (the machine having been restored in the mean time to its former position) on which latter occasion the two defendants *Teale* and *Helme* were accompanied by *Cunningham* and the other defendants, and a large body of assistants. At the close of the plaintiff's case,

Cresswell, on the part of the defendants, required the plaintiff to elect for which trespasses he would

go. Contending that he must abandon either the trespasses on the 5th *October*, in which only two of the defendants (*Helme* and *Teale*) took part, or else the other trespasses, at which all the defendants were present; and he referred to *Tait v. Harris*. (a)

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Starkie, for the plaintiff, said he would confine himself to the trespasses committed by *Helme* and *Teale*, on the 5th *October*, and to such other trespasses as he could prove that those two defendants were jointly concerned in.

PATTESON J. (after referring to *Tait v. Harris*, and saying that he could not very well understand the principle upon which that decision was founded), said, that he thought the plaintiff could not do this. If he elected to proceed for the trespasses committed on the 5th *October* by *Helme* and *Teale*, he might also go for other trespasses, in which those two defendants, and those two only, were concerned; but he should not allow the plaintiff to recover, even as against those two, for other trespasses, in which more of the defendants than *Helme* and *Teale* were implicated.

Starkie then said he would proceed for the trespasses committed by *Helme* and *Teale* only.

Cresswell then applied to the court that the defendants against whom no evidence had been

(a) 1 Moody & Rob. 282.

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adduced, connecting them with those trespasses, might at once be acquitted, in order to their becoming witnesses for the other defendants.

Starkie objected that this could not be done. If indeed there had been no other plea than the general issue, the course suggested might be taken, but here there were special pleas on the record, affecting even the defendants, who, on the plea of not guilty, might be entitled to an acquittal. Upon the special pleas those defendants might still be liable to pay costs under the new rules; and if they were now acquitted and made witnesses, they might give evidence in their own behalf, whereby to relieve themselves from the costs of the special pleading.

Cresswell said it had long been the common practice to acquit at the close of the plaintiff's case such of the defendants as then appeared entitled to an acquittal, and that the new rules never could have been intended thus to alter the course of practice, and thereby deprive the defendants, remaining on the record, of the benefit of the evidence of the innocent co-defendants.

PATTESON J. It seems to me that the new rules have, for the reason suggested by Mr. *Starkie*, materially altered the case. The defendants who have pleaded special pleas of justification have an interest in the record, by reason of their liability to the costs of those pleas; whatever becomes

of the general issue. I think, therefore, I cannot assist the other defendants by directing an acquittal now.

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The application was accordingly refused.

Verdict, as to defendant *Helme*, Guilty ; as to all the other defendants, Not Guilty.

Starkie, Brandt, and Cowling for the plaintiff.

Cresswell and Wightman for the defendants.

JACOB v. LEE.

LIVERPOOL,
April 5.

THE defendant had been served with a notice requiring him to produce "all and every letters written by the said plaintiff to the said defendant, relating to the matters in dispute in this action."

Anotice to produce "all and every letters written by the plaintiff to the defendant, relating to the matters in dispute in the action," is sufficient to let in secondary evidence of a particular letter, though it do not specify the date of such letter.

The defendant declined on the trial to produce a particular letter called for, and contended that the notice to produce was too general ; it should have specified the letter alluded to, either by its date or some other peculiarity, and *France v. Lucy* (a) and *Jones v. Edwards* (b) were cited.

PATTESON J. said he thought the notice was sufficient. The present case was distinguishable

(a) R. & M. 341.

(b) M'Clel. & Y. 139.

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from those that had been cited, because the notice, in this instance, did mention the names of the parties by whom and to whom the letters were addressed.

The plaintiff was accordingly allowed to give secondary evidence of the contents of the letter.

Verdict for the plaintiff.

Alexander and Tomlinson for the plaintiff.

Cresswell and Wightman for the defendant.

LIVERPOOL,
March 28.

HOPWOOD and Others v. SCHOFIELD.

A reversioner cannot sue for the obstruction of a right of way, unless the obstruction be such as either permanently injures the estate, or operates in denial of the right.

ACTION on the case for damage done to the plaintiffs' reversionary interest in land.

The declaration stated, that the plaintiffs were seised in fee of certain lands and premises with the appurtenances, and entitled to a right of way therefrom for carts and carriages over a certain road leading, &c., to wit, at the expiration of the tenancy of one *J. S.*, now being tenant from year to year thereof to the said plaintiffs. That the defendant was the owner and occupier of a certain piece of land allotted to him under an Inclosure Act, and that by the award made under that Act the commissioners directed and ordered that the road should be kept in repair by the owners and occupiers of the piece of land of which the defendant was so in occupation, for the use and enjoyment of the several allotments

therein mentioned (the plaintiffs' land being one of the allotments). That the defendant nevertheless had neglected to keep the road in repair, and that it had fallen into great decay, whereby the plaintiffs were greatly injured in their reversionary interest.

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Plea, Not Guilty.

It was proved that the roadway had been out of repair for three years ; that at present it was in such a state that it could not be safely used ; but that it might be again put into proper repair in the space of a fortnight, at an expense of 50*l*. Evidence was also given by the plaintiffs, that their lands would let at a less rent if the road remained in its present bad condition than if it were in proper repair.

Cresswell, for the defendant, objected, that the action could only be sustained by the tenant in possession, and that the present plaintiffs must be nonsuited. The reversioner could not maintain an action of this kind, unless he could shew either that the act complained of was in its nature a permanent injury to his property, *Jackson v. Pesked* (a), *Young v. Spencer* (b), or else that the act endangers the *right* of the reversioner, as where a watercourse is diverted from his estate, or lights are stopped up: in those cases the obstruction endangers the right, and so works an immediate injury to the reversioner. But here the right does not depend

(a) 1 M. & Selw. 234.

(b) 10 B. & C. 145.

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upon the user, but is given and preserved to the reversioner by the award of the commissioners; it is therefore put in no jeopardy by the non-repair of this road, even if that non-repair had amounted to actual obstruction, which, however, it clearly did not.

Alexander, contra. The plaintiffs' estate is proved to be of less value by reason of the defendant's default; that is a sufficient injury to entitle them to bring this action. It is also a permanent injury, because if it remains unredressed, the estate will be permanently deteriorated in value.

PATTESON J. I do not say that a right of way may not be obstructed under such circumstances as would entitle the reversioner to an action on the case; but *Jackson v. Pesked* (a) and all the authorities shew that he can only sue for a permanent injury to the object of his reversionary interest. How can that injury be called permanent which, it is in evidence, can be redressed in a few days? If, indeed, there had been any obstruction operating in denial of the right, it might have been different; but as the case now stands, I do not think there is any thing to be left to the jury, and therefore the plaintiffs must be called.

Nonsuit.

Alexander and John Addison for the plaintiffs.
Cresswell and Wightman for the defendant.

(a) 1 M. & Selw. 234.

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DORCHESTER.

Coram GURNEY B.

REX *v.* ANDREWS.

DORCHESTER,
March 11.

THE prisoner was indicted for night poaching, under 9 G. 4. c. 69. s. 9.

The first count charged that the prisoner, with others, being armed, &c., entered certain land in the occupation of *A. B.* in the parish of *Melbury*, &c. The second count charged the prisoner with entering, &c. on certain *inclosed* land in the occupation of *A. B.* in the parish of *Melbury*.

In an indictment under 9 G. 4. c. 69. s. 9. it is sufficient to charge entering, &c. certain land in the occupation of *A. B.* &c. without specifying whether it was inclosed or not.

According to the evidence for the prosecution the prisoner and two other men were found by the gamekeepers in a narrow halter-path lane, running alongside of a clover field, and close to a gate dividing the lane from a down; there was also a gate leading from the clover field into the down, which was very near the gate of the lane. A net was stretched across both gates, and a fourth man with a dog was found in the clover field. The lane was of considerable length, and with the clover field and down was in the occupation of *A. B.* It was fed by him, and the hedges cut for fire wood; at the other end there was no gate.

If one of a party of poachers be found in the land specified, the rest co-operating in the pursuit of game in adjoining land, all may be alleged to be found in the land specified.

At the close of the prosecutor's evidence *Saunders* objected that the first count was not sustainable, inasmuch as the statute mentioning open and inclosed land, the indictment ought to specify

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which. Secondly, that the lane in which the prisoner was found was not inclosed land, as described in the second count.

For the prosecution it was answered that it was perfectly immaterial whether the land entered was inclosed or not ; and the statute was worded to shew that the legislature meant it to be unimportant, the terms being “ any land, whether open or inclosed.” But that, at all events, if the four men were of the same party, they might all be said to be found in the clover field where the fourth man was found, the others being employed on the same purpose. *R. v. Lockett (a)*. *R. v. Passey (b)*.

In reply *R. v. Dowset (c)* was cited.

GURNEY B. I am quite satisfied that the first count is good, and I also think that the second count is made out by the evidence, if believed. I think all the prisoners may be said to be found in the clover field, within the meaning of the statute, but I will reserve the point if it shall be necessary.

Witnesses were called for the prisoner to prove an alibi, and the jury acquitted him.

Moody for the prosecution.

Saunders for the prisoner.

(a) 7 Carr. & P. 300.
 (c) 6 Carr. & P. 398.

(b) *Ib.* 282.

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TAUNTON.

Coram GURNEY B.

REX *v.* LOVEL.

TAUNTON,
April 7.

THE prisoner was indicted under 9 *G. 4. c. 31. s. 12.* for maliciously shooting at *G. Chinnock* with intent, &c.

The fact of firing a gun into a room of A. B.'s house with intent to shoot A. B., the prisoner supposing him to be in the room, will not support a charge of shooting at A. B., if he be shewn not to be in the room, or within reach of the shot.

The prisoner, according to the evidence, had fired a gun into a room of *Chinnock's* house where he supposed *Chinnock* was, but it turned out that in point of fact *Chinnock* was in another part of the house, where he could not by possibility be reached by shot from a gun so fired.

Upon this the learned judge interposed, and asked the prosecutor's counsel whether the indictment could be supported? A man could scarcely be said to be shot at, who was not near the place where the gun was fired.

Kinglake, for the prosecution, cited *R. v. Bailey (a)*, where the commander of a ship, who had fired into another ship, was said to have fired at every individual in her.

GURNEY B. That case is perfectly distinguishable from the present; cannon shot fired into a ship more or less endangers every individual in it; every part of the ship may be penetrated by cannon shot; but that cannot be said of shot fired from a gun into a room where it is proved no individual then was.

Not Guilty.

Kinglake for the prosecution.

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TAUNTON,
April 7.

REX v. JARVIS, LANGDON, and STEAR.

An indictment under 9 G. 4. c. 31. s. 12. for maliciously shooting at A. B. is supported if he be struck by the shot, though the gun be aimed at a different person. A prisoner who employed another person to harbour the principal felons may be convicted as accessory after the fact, though he himself did no act of relieving, &c. and the prisoner may be found guilty on the uncorroborated testimony of the person who actually harboured, &c.

THE prisoners *Jarvis* and *Langdon* were indicted under 9 G. 4. c. 31. s. 12., in the first count for maliciously, &c. shooting at *G. Lockyer*; and in the second count, for maliciously, &c. shooting at *C. Hole*. The prisoner *Stear* was charged as accessory after the fact.

The two first prisoners were on the night in question with a large party poaching on ground within the charge of *Hole*, who was a gamekeeper. *Hole* and *Lockyer*, with others, came up to them, and were about to attempt to apprehend some of the party, when *Jarvis*, according to the witnesses, levelled his gun at *Hole* who was in advance, but missed him, and hit *Lockyer*, but not dangerously.

The counsel for the prosecution had elected to proceed on the count charging the shooting at *Lockyer*.

The facts to prove the charge against *Stear* were, that he had employed a man, by the name of *Jones*, to remove the two first prisoners out of the way, he being afraid they would give evidence against his sons, who were charged with being of the party of poachers. For this purpose *Stear* had given *Jones* money, and he had hidden the prisoners in an outhouse, belonging to *Stear*, for a short time, and then took them out of the county during the investigation before the magistrates; but there was no act of immediate harbouring, or protecting, proved against *Stear*, nor was it shewn that he had seen the two first prisoners after

the felony. The only witness to prove the facts against *Stear* was *Jones*.

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Kinglake, for *Stear*, contended that he was entitled to an acquittal. The offence charged was a felony, and the prisoner must be proved to have been an immediate agent in it. *Jones*, who actually took the two first prisoners away and supported them was the accessory, and the prisoner *Stear* was in the nature of an accessory before the fact to him. Secondly, inasmuch as *Jones* was an accomplice, at all events he ought to be corroborated, or else the jury should be directed not to believe him.

GURNEY B. The facts proved are (if believed) sufficient to make the prisoner *Stear* liable as an accessory: if he employed another person to receive, relieve, comfort, and assist the principal felons, he did it himself.

The counsel for the other prisoners, in their addresses to the jury, contended that the prisoners could not be convicted in point of law of shooting at *Lockyer* with intent to injure him, inasmuch as the person aimed at, according to the evidence, was another, and *Lockyer* was only struck accidentally. (a)

GURNEY B. in summing up, told the jury it was perfectly immaterial for whom the shot was intended. If a man laid poison for one person, and

(a) *R. v. Hunt*. Moody's C. C. R. 93.

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 v.
 JARVIS,
 and OTHERS.

another took it and died, it would be murder; so a blow, aimed at one person and killing another, would make the party equally answerable. With regard to the necessity of confirming an accomplice, much might depend upon the nature of the crime in question; it was for the jury to consider whether there was any thing in *Jones's* conduct to warrant their disbelieving him.

The prisoners were acquitted.

Bere for the prosecution.

Stone and *Ball* for the prisoners *Jarvis* and *Langdon*.

Kinglake for the prisoner *Stear*.

TAUNTON,
April 8.

REX v. FRY and WEBB.

The mere use of a small stick as a weapon by a poacher, in a sudden affray with gamekeepers, is not enough to prove such stick an offensive weapon under 9 G. 4. c. 69. s. 9. The jury must be convinced that the party took it with him for the purpose of offence.

THE prisoners were indicted under 9 G. 4. c. 69. s. 9. for entering land by night armed with offensive weapons, to wit, bludgeons, with intent to destroy game; there was also a count for a common assault.

The only weapons proved to have been used by the prisoners were sticks; one of these was produced, with which one of the prisoners, upon being attacked by the gamekeeper, had defended himself, and knocked down the gamekeeper. The stick however was a very small one, fairly answering the description of a common walking stick.

Upon objection being made that the stick could not be considered an offensive weapon within the statute,

Bere, for the prosecution, cited *R. v. Johnson* (a), and contended that the use of the stick, made by the prisoner, shewed both the intention of the prisoner and the nature of the stick.

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 v.
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 ANOTHER.

GURNEY B. If a man goes out with a common walking stick, and there are circumstances to show he intended to use it for purposes of offence, it may perhaps be called an offensive weapon within the statute ; but if he has it in the ordinary way, and upon some unexpected attack or collision is provoked to use it in his own defence, it would be carrying the statute somewhat too far to say it is an offensive weapon within the meaning of the act.

The prisoners were convicted of a common assault only. (b)

Bere for the prosecution.

Stone for the prisoners.

(a) Russ. & Ry. 492.

(b) See *R. v. Palmer*. 1 Moo. & R. 70.

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TAUNTON,
April 10.

REX v. SARAH SNELL.

In order to convict a woman under 9 G. 4. c. 31. s. 14. the body of the child must be completely disposed of: a prisoner found with the body still in her possession, though about to dispose of it, cannot be convicted.

THE prisoner was indicted under 9 G. 4. c. 31. s. 14. for endeavouring to conceal the birth of her child.

The facts to prove the attempted concealment were, that the prisoner was found going across a yard in the direction towards a privy, with a bundle, and was stopped. The bundle, on examination, was found to be a cloth sewed up, with the body of the child in it.

GURNEY B. interposed, and said that the prisoner could not be convicted, the offence not having been completed. The statute enacts that "If any woman shall *by secret burying, or otherwise disposing of* the dead body of the child, endeavour to conceal the birth thereof, such offender shall be guilty of a misdemeanor." The body, then, must be buried or otherwise disposed of, to bring the case within the act. Here she was interrupted in the act, probably, of disposing of the body, but the act was incomplete.

Not Guilty.

Ball for the prosecution.

Bere for the prisoner.

CASES
ARGUED AND DECIDED
AT NISI PRIUS

IN THE COURTS OF
K. B. & EXCHEQUER,
AT THE SITTINGS AFTER
TRINITY TERM,
7 & 8 WILL. IV. 1837.

SITTINGS IN K. B. AFTER TRINITY TERM.

1837.

THORNTON v. STEPHEN.

WESTMINSTER,
June 13.

THIS was an action for a libel contained in the leading article of a newspaper called the *Christian Advocate*.

One paragraph of the libel, set out in the declaration, referred to a report (contained in another column of the same newspaper) of an inquiry which had been instituted by the leading members of a Society of Methodists into the conduct of a Mr. *Bullard*, at which inquiry the plaintiff took part against him.

The libel alleged various defamatory matters against the plaintiff, provoked (as the writer said) by the part which the plaintiff had taken against Mr. *Bullard*.

In an action for a libel contained in a newspaper, the defendant has a right to have read, as part of the plaintiff's case, another part of the same newspaper referred to in the libel complained of.

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THORNTON
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STEPHEN.

R. V. Richards, for the defendant, insisted that he was entitled to have the report of the inquiry read as part of the plaintiff's case.

Sir *F. Pollock* admitted that the defendant was entitled to have the report brought under the consideration of the jury, inasmuch as it was referred to in the libel complained of, but he contended that the defendant could only do so by making it part of his own evidence.

LORD DENMAN C. J. The same point, I think, arose in the *King v. Lambert and Perry (a)*. It does not indeed distinctly appear in the report whether the remainder of the publication was there read as the defendant's case or as part of the plaintiff's; but I think the import of it is, that it should be considered part of the plaintiff's case.

The report was accordingly read as part of the plaintiff's case.

Verdict for plaintiff, damages 40s. (*b*).

Sir *F. Pollock* and *Matthews* for plaintiff.

R. V. Richards for defendant.

(a) 2 Camp. R. 398.

(b) It seems reasonable that where a party produces a document in evidence he must be considered as producing the whole of the document; his opponent has therefore a right to refer to any part of it, as already in proof: in other words, he may extract the remaining contents of the document (provided they be relevant to the subject matter) and bring them before the jury, on the same principle that he may by cross-examination extract from a witness all facts within that witness's memory, provided they be relevant to the subject matter.

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THORNTON
v.
STEPHEN.

20th June.

MEMORANDUM.—The several Courts assembled as usual this day ; but in consequence of the demise of His Majesty King WILLIAM IV. they were immediately adjourned until the morrow.

DOE dem. CARTER v. JAMES.

WESTMINSTER,
June 21.

EJECTMENT by the heir at law of *Daniel Symonds*, who was heir at law of *John Symonds*.

The defendant claimed as devisee of *John Symonds*, but admitted the pedigree of the lessor of the plaintiff, and called a witness to produce the will of *Daniel Symonds*, for the purpose of shewing that (after bequeathing his personal property in manner therein mentioned) he devised all his real estate to a stranger (*Thomas Minshull*). The witness stated himself to be the attorney of *Minshull* ; that he held the will in question as the attorney of *Minshull*, and that he therefore declined to produce it.

A witness is not bound to produce, in obedience to a subpoena, a will which he holds as attorney for a devisee claiming under it ; although it be suggested that it is a will of personalty, as well as of realty, and ought therefore to be deposited in the Ecclesiastical Court.

Kelly and *B. Andrews*, for the defendant, submitted that the witness was bound to produce the will. It is a will of personalty as well as realty, and

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should therefore, in strictness, have been deposited in the Prerogative Office. The person withholding the will from that place of deposit, where the public may have access to it, is a wrong-doer, and cannot take advantage of his own wrong by thus refusing to produce a document which the law has provided shall be open to the public. If there be any doubt whether the will be or be not a will of personalty as well as realty, the learned judge may himself inspect it for the purpose of ascertaining that fact : a course which is often taken in questions arising under the stamp laws. Besides, at present the will is only known as the will of one *Daniel Symonds* : whether *Thomas Minshull* be the devisee under it, *non constat* until the document be produced.

Sir *J. Campbell* A. G. It was admitted in the opening that *Minshull* claimed as devisee under *Symonds's* will, which is therefore one of his muniments of title, and the attorney acts correctly in withholding it. As to the supposed obligation on the devisee of lodging the will at *Doctors Commons*, the will is here in question only as a will which need not be so lodged, viz. as a will of realty.

LORD DENMAN C. J. Mr. *Minshull* has this will as a devisee under it ; and that being so, I do not think I can call on his attorney to produce it. It is suggested that it is a will of personalty, and that I may refer to it to ascertain whether the fact be so : but I do not think that a judge has any more

privilege to examine the document than any one else. I cannot call on the witness to produce it.

Verdict for defendant: (a)

Sir *John Campbell* A. G. and *Fry* for the prosecution.

Kelly, B. Andrews and *Roberts*, for the defendant.

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 Doe dem.
 CARTER
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 JAMES.

(a) A rule, calling on the defendant to shew cause why there should not be a new trial, has been obtained on other points, and is still pending.

ADJOURNED SITTINGS IN THE EXCHEQUER.

PIRIE v. STEELE.

LONDON,
 June 30.

ASSUMPSIT on a time policy effected on the ship *Augusta Jessie*, from 27 February, 1835, to 26 February, 1836.

The defendant paid money into court, and pleaded that the plaintiff had not sustained any damage beyond the amount so paid into court.

The ship met with injury in September, 1835, on her voyage from *Madras* to *London*, and the amount paid into court was sufficient to cover the loss sustained by that injury, supposing the underwriter was entitled to the customary deduction of one third, the assured having had the benefit of new work for old : if the underwriter was *not* entitled to

A new ship was chartered and insured from *London* to *N. S. Wales*, and the freight made payable on her arrival there. Being unable to procure homeward freight, she went to *Madras*, and there took in freight to *England*, and a fresh policy was entered into. The ship was lost on the home-

ward voyage; the route being a common one for ships chartered to *New South Wales*: Held, that the ship was on her first voyage, and that consequently the underwriters were not entitled to a new-for-old deduction of one-third.

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that deduction, the amount paid into court was insufficient. It was admitted that the underwriter had no right to deduct one third, if the ship was at the time of the loss to be considered *a new ship on her first voyage*. It appeared by the evidence that the ship was built at *Sunderland* in 1834, and was shortly afterwards chartered by the government from *London* to *Port Jackson* and *Van Diemen's Land*, for the purpose of conveying convicts, at a certain rate of freight, payable on arrival there. The plaintiff effected a policy on the ship for that voyage. The ship completed her outward voyage, and being unable to procure a homeward cargo from *Van Diemen's Land*, the captain took her in ballast to *Madras*, and there procured a homeward freight to *London*. The policy in question in this action was effected after the ship left *Van Diemen's Land*, and the loss arose in her homeward voyage from *Madras* to *London*.

Under these circumstances the plaintiff contended that the ship was on her first voyage; and he called witnesses to prove, that when ships were chartered from *England* to *N. S. Wales* or *Van Diemen's Land*, it was a customary route for them to go on to *Madras* for the purpose of getting a freight home to *England*, and that the ship was in the mercantile world understood to be on her first voyage until she returned to *England*.

Sir J. CAMPBELL A. G. for the defendant, insisted that the ship being chartered to *New South Wales*, the freight made payable there, and the first policy ending there, she must be considered as having completed her first voyage when she

reached that destination; if so, the loss not having arisen until her next voyage, the rule entitling underwriters to the new-for-old deduction of one-third applied, and he cited *De Costa v. Newnham* (a), *Poingdestre v. Royal Exchange Assurance Company* (b), to shew the disinclination of the courts to narrow that rule. He referred also to *Thompson v. Hunter*, tried before Mr. J. Bayley on the Northern Circuit, where the policy was effected in *Dublin* on a voyage from the *Humber* to the *Baltic* and back, and where a practice was relied upon by the ship owner, as prevailing on the *Humber*, that all ships were considered as new ships, so as to exclude the underwriter from the deduction, if they had been only built twelve months. Mr. J. Bayley held, that the policy being an *Irish* one, the practice on the *Humber* could not be set up to counteract the general rule, and the plaintiff recovered the full amount of his loss. He also cited *Fenwick v. Robinson*. (c)

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The *Attorney General* then called many witnesses (principally underwriters) for the defendant, who all agreed that under the circumstances of the present case the voyage from *Madras* to *London* was *not* the first voyage; but on their cross-examination they gave very different tests by which to decide whether a ship was, or was not, on her first voyage; some saying that the first voyage ended where the first freight was earned; others, that if a ship came home in ballast, her homeward voyage was a con-

(a) 2 T. R. 407.

(b) R & M. 378.

(c) Danson and Ll: R. 8.

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tinuation of the outward voyage, forming only one voyage ; some witnesses gave it as their opinion that the question depended upon the particular language of the policy, others on the particular language of the charter-party.

On Sir *F. Pollock* rising to reply for the plaintiff, the jury stopped him, and expressed themselves satisfied that the rule, allowing a deduction of one-third, did not apply to such a case as the present.

LORD ABINGER C. B. expressed himself of the same opinion, saying, that in his judgment the meaning of the term "first voyage" was to be ascertained by the general understanding of merchants, and not by the opinion of underwriters only.

Verdict for the plaintiff.

Sir *F. Pollock*, *Thesiger*, and *Richards* for the plaintiff.

Sir *J. Campbell* A. G. and *Maule* for the defendant.

SUMMER ASSIZES, 1 Vict.

1837.

YORK.

Coram COLTMAN J.

REX v. BAKER.

YORK,
July 17.INDICTMENT for poisoning *John King*.

The poison was administered in a cake which the deceased ate for breakfast, immediately after which he was taken ill, and told his son not to eat the remainder of the cake. His maid-servant, who was present, (and had made the cake,) said that she was not afraid of it; and thereupon she did eat of it, and was in consequence poisoned, and speedily died. Her dying declarations, (made after she knew of her master, *J. King's*, death, and while she was conscious of her own approaching death,) as to the manner in which she had made the cake, and that she had put nothing bad in it, and that the prisoner was present eating his breakfast at one end of the table while she was making the cake at the other end of it, having been tendered in evidence on the part of the prosecution,

On an indictment against a prisoner for the murder of A. by poison, which was also taken by B. who died in consequence: Held, that B's dying declarations are admissible.

Dundas, for the prisoner, objected that the declarations were not admissible in evidence against him. He submitted that the only person whose dying declarations could be received in evidence against the prisoner, was the party whose death formed the subject of enquiry at the trial. Here, the jury were impanelled to enquire into the cause of the death of *John King*, and not into the cause

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REX
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of the death of the maid-servant. The rule had always been strictly adhered to. He cited *Rex v. Hutchinson (a)* where the prisoner was indicted for administering savin to a pregnant woman, with intent to procure abortion. The woman being dead, evidence of her dying declarations being tendered for the prosecution, was rejected by *Bayley J.* because the woman's death was not the subject of enquiry.

COLTMAN J., after consulting PARKE B., expressed himself of opinion, that, as it was all one transaction, the declarations were admissible, and accordingly allowed them to go to the jury; but he said he would reserve the point for the opinion of the Judges.

Acquittal.

Atcherley Serjt. and *R. C. Hildyard* for the prosecution.

Dundas for the prisoner.

(a) 2 B. & C., 608. n.

WESTERN CIRCUIT.—DEVIZES.

Coram PATTESON J.

DEVIZES.

July 17.

DAY v. BREAM.

A porter who in the course of his business delivers parcels containing libellous handbills, is not liable in an action for libel, if he be shewn to be ignorant of the contents of the parcels.

CASE for a libel. Plea, Not Guilty.

The libel complained of was a printed handbill, containing imputations on the plaintiff clearly

containing imputations on the plaintiff clearly

libellous. The plaintiff lived at *Marlborough*; the defendant was the porter of the coach-office at that place, and it was his business to carry out and deliver the parcels that came by the different coaches to the office. For the plaintiff it was shewn that the defendant had delivered on the same day paper parcels, tied up, and containing a large quantity of the handbills in question, to two or three inhabitants of the place, to whom the parcels were directed. No carriage was marked or charged, nor any thing charged for portorage. Nothing was shewn to prove that the defendant was aware of the contents of the parcels.

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DAY
v.
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Bere submitted that no case was made out to go to the jury.

PATTESON J. ruled that there was enough to call upon the defendant to shew how he became possessed of the parcels.

Witnesses were then called for the defendant, who proved that the parcels in question were some of five, which came by the *London* coach, inclosed in a large parcel directed to the defendant, each of the inclosed parcels being directed to some inhabitant of the place. The defendant was not charged with any carriage for the parcel, because it was usual to bring things *gratis* for the servants of the coach proprietors; and he was directed by a proprietor who happened to be in the office when the parcel arrived, to deliver the inclosed parcels to the persons to whom they were directed.

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PATTESON J., in summing up, left it to the jury to say whether the defendant delivered the parcels in the course of his business without any knowledge of their contents; if so, to find for him, observing, that *primâ facie* he was answerable, inasmuch as he had in fact delivered and put into publication the libel complained of, and was therefore called upon to shew his ignorance of the contents.

Verdict for the defendant.

Erle and *Barstow* for the plaintiff.

Bere for the defendant.

DEVIZES,
July 17.


DOE d. EARL MANVERS v. JAMES
MIZEM and JOHN MIZEM.

An agent to receive rents and let has authority to determine a tenancy. In ejectment a person defending as landlord is bound by the same estoppel as the tenant in possession.

JAMES MIZEM was the tenant in possession, and *John Mizem* had entered into a consent rule to appear and defend as landlord.

The steward of *Earl Manvers* had let the premises to *James Mizem* from year to year, and had given him the usual notice to quit. It appeared on cross examination of the steward, that at the time of the demise to *James Mizem* the premises were under a demise from year to year to another person, who had absconded and left the premises vacant, but had not surrendered, nor received notice to quit. The steward stated that he was in the habit of letting *Earl Manvers's* lands, and receiving the rents, and accounting to him, and that he succeeded a former steward who did the same, but no express authority was shewn.

It was objected, that no authority to determine a tenancy was shown, *Doe d. Mann v. Walters* (a), and that the right to the possession was still in the former tenant. That though *James Mizem* might be bound by the estoppel not to dispute his landlord's title, there was nothing to shew that *John* was.

1837.

 DOX dem.
 Earl MANVERS
 v.
 JAMES MIZEM
 and ANOTHER.

PATTESON J. An agent to receive rents and to let has authority to determine a tenancy, *Doe, d. Marsac and Others v. Read*. (b) *John Mizem* defends *James's* possession; if *James* has no right, *John* can have none to the possession. He is equally bound by the estoppel.

Verdict for the plaintiff.

Bompas Serjt. and *Bere* for the plaintiff.

Crowder and *Ball* for the defendant.

(a) 10 B. & C. 626.

(b) 12 East. 57.

LAUNCESTON.

Coram PATTESON J.

DOE d. HARVEY v. FRANCIS.

LAUNCESTON,
 August 1.

THIS was an ejectment brought for a stamping mill.

The lessor of the plaintiff proved payment of rent to him by the defendant, and the delivery of a notice to quit signed by the lessor of the plaintiff.

Where the only evidence of a tenancy is payment of rent, the person paying is in all cases at liberty to ex-

plain the payment, and to shew on whose behalf it was received.

1837.

DOE dem.
HARVEY
v.
FRANCIS.

Erle proposed to put in evidence an answer in Chancery of the lessor of the plaintiff, in which he had sworn that he had no legal interest in the mill, but had acted as agent for third parties, namely, of the adventurers in a mine, of which the lessor of the plaintiff was one.

Crowder objected, that the tenant was estopped from disputing the title of a person to whom he had paid rent.

PATTESON J. overruled the objection, and held, that where a tenancy was attempted to be established by mere evidence of payment of rent, without any proof of an actual demise, or of the tenant's having been let into possession by the person to whom the payment was made, evidence is always admissible on the part of the tenant to explain the payment of rent, and to shew on whose behalf such rent was received.

Erle was accordingly allowed to give evidence, to shew the real interest of the lessor of the plaintiff; but upon such evidence being given, it appeared to the learned judge, that in point of fact the defendant had taken the mills of the lessor of the plaintiff as his tenant: and thereupon a verdict was directed for the lessor of the plaintiff, subject to a bill of exceptions upon other points.

Crowder and *M. Smith* for the plaintiff.

Erle and *Jardine* for the defendant.

1837.

BRIDGWATER.

Coram PATTESON J.MASTERS *v.* LEWIS.BRIDGWATER,
August 7.

ON this cause being called on,

Erle, for the defendant, objected to its being tried, as it did not appear that the *distringas* had been returned. The record had the pannel and the *venire* attached, and the *distringas*, which was correct, except that the words "The execution of this writ appears by the pannel annexed.—*Alex-ander Adair*, Sheriff," were wanting.

A Nisi Prius record, to which a *venire*, *distringas* and pannel are annexed, may be withdrawn at Nisi Prius, and amended by indorsing on the *distringas* the execution thereof, and re-entered.

Bompas Serjt. claimed that the sheriff should be allowed to complete the writ by the indorsement of the execution of it in the usual words.

The under-sheriff was examined, and stated that the proceedings were regular, and that the practice was to make the return of the *distringas* in the country ; that it was the duty of the plaintiff's attorney to bring the writ for the return to be indorsed, and the pannel to be annexed ; and that the jury in the pannel annexed to the *venire* had been regularly summoned.

PATTESON J. said it was a piece of gross negligence on the part of the attorney, and hesitated

1837.

MASTERS
v.
LEWIS.

whether to allow the record to be completed, but, after consideration, said that the record might be withdrawn and completed by the under-sheriff, and re-entered.

This was done *instantly*, and the cause proceeded.

Verdict for the plaintiff.

Bompas Serjt. and Stone for the plaintiff.
Erle and Barstow for the defendant.

BRIDGWATER,
August 9.

FITZ v. RABBITS.

In order to let in secondary evidence of a document, it is not necessary that the search for that document should have been recent, or made for the purpose of the cause. A search amongst the proper papers three years before the trial of the cause was held sufficient.

ASSUMPSIT for use and occupation.

Plea, *Non assumpsit*.

The defence to this action was, that the premises had been taken by the defendant's father, and not by the defendant. In fact they had been occupied from 1831 by a gamekeeper, put into them by the defendant, and his servant, as it was alleged on the part of the plaintiff.

In order to prove the terms of the original taking, the defendant called his brother, who stated, that he had seen a paper in the handwriting of the plaintiff directed to his father, containing his proposals for the taking. The father died in 1833, and after his death, and nearly three years before the commencement of the present action, the witness and the defendant, who was one of his father's executors, had searched for the paper amongst the papers of the father in his house, and could not find

it. Subsequently to this, the defendant had removed some of the papers from the house, and no further search had been made. It did not appear for what purpose the search had been made. The witness said he believed the paper had been destroyed.

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Fitz
v.
RABBITS.

It was objected for the plaintiff, that secondary evidence was inadmissible; that a search ought to have been made for the purpose of the action, both in the house of the father, where the widow and one of the executors were living, and also amongst the papers removed.

PATTESON J. It would certainly have been more satisfactory if a recent search had been made; but I must take it that the search amongst the papers shortly after the father's death was sufficient, and would have been enough to let in secondary evidence at that time; and though I do not recollect any instance in which a search made for other purposes than letting in secondary evidence, and so long ago as three years, has been considered enough, yet I think I ought not, under the circumstances, to reject the secondary evidence.

The witness was allowed to state the contents of the paper, and a verdict for the plaintiff was afterwards taken upon terms agreed on.

Crowder and Moody for the plaintiff.

Erle and Butt for the defendant.

1837.

BRIDGWATER,
August 7.BROOKS and Another, Assignees of JAMES
BOE, a Bankrupt, v. GLENCROSS.

Only one penalty can be recovered against the same party under 6 G. 4. c. 16. s. 120., though there may be different acts of concealment; and different acts may be given in evidence on one count. *Semble*, a creditor of the bankrupt may be liable to the penalty, though a fraudulent preference was intended.

DEBT, on 6 Geo. 4. c. 16. s. 120, to recover a penalty for the wilful concealment of a bankrupt's goods.

The declaration, after reciting that *James Boe* was a trader, &c., and had become bankrupt, and that a fiat in bankruptcy had issued against him, and reciting the proceedings had under that fiat, stated that the defendant, knowing the premises, after the said *James Boe* became a bankrupt, unlawfully and wilfully concealed certain personal estate of the said *James Boe*, consisting of divers goods and chattels (setting them out), and did not, within forty-two days after the issuing of the fiat, or at any other time, discover such estate to the commissioners named in the fiat, or to any commissioner of the court of bankruptcy, or to the plaintiffs, whereby the defendant had forfeited for his offence 100*l.*, and also 1,000*l.*, being double the value of the personal estate so concealed and not discovered.

The defendants pleaded, 1st, That the defendant did not wilfully conceal the said personal estate, or any part thereof.


2d, That the defendant did, within forty-two days after the issuing of the said fiat, discover to the commissioners (setting out their names) the personal estate of the said *James Boe*.

The plaintiffs took issue on these pleas.


It appeared in evidence that on the 4th of *May*, 1836, *Boe* (the bankrupt) and the defendant engaged a waggoner to convey some packages belonging to the bankrupt from *Wells*, where the bankrupt lived, to the house of the defendant at *Bridgwater*. The waggoner stated that he accordingly carried to the house of the defendant goods of the weight of about half a ton. The date of the fiat was the 28th *May*, 1836; on the 20th *June* following, the messenger under the commission went to the defendant's house, and told the defendant that he had a warrant to search for the goods. The defendant said that there were some there, and shewed them to the messenger, who took possession of them. There was some evidence to shew that the removal was made under suspicious circumstances.

Evidence was also offered on the part of the plaintiffs, that in *May*, *Boe* and the defendant had carried some goods to the house of one *Boys*, at *Wells*, to be kept there by him, which *Boys* gave up to the messenger on the 18th *June*.

Crowder and *Kinglake*, for the defendant, contended, that this evidence was inadmissible, on the ground that it was proof of a separate and distinct act of concealment. They submitted that there being but one count in the declaration, only one

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act of concealment could be given in evidence in this action, and that a separate penalty might, by other proceedings, be recovered for each separate concealment. The offence charged did not involve any question of guilty knowledge ; and therefore the rule which in various cases allows evidence of circumstances not connected with the particular offence to be given in order to raise a presumption of guilty knowledge in the particular transaction, does not apply.

Bompas Serjt., for the plaintiffs, submitted, that under the 6th *Geo. 4. c. 16. s. 120.* only one penalty could be recovered, and that any number of acts might be adduced to shew a wilful concealment of a bankrupt's property.

PATTESON J. I do not think a separate penalty could be recovered for each distinct act of concealment, and I will therefore admit the evidence.

The evidence was accordingly given.

Crowder, in addressing the jury for the defendant, contended that the act of parliament did not apply to any case where a previous debt existed between the bankrupt and the party charged : that any subtraction of goods, under such circumstances, from the bankrupt's estate, might amount to a fraudulent preference, but was not the offence contemplated by the statute : and he offered evidence to shew that the defendant was a creditor of the bankrupt, and that some of the goods had been delivered up.


PATTESON J., in summing up said, If the defendant is to be considered as a *bonâ fide* creditor of the bankrupt, this is, as far as my experience goes, a novel action. It is brought under the 6 *Geo.* 4. c. 16. s. 120. The truth is, that creditors often persuade a bankrupt to give them a preference in the settlement of their claims; but, as far as I know, no one has been for such conduct considered as having committed an offence within the 120th section of this act of parliament. In my opinion, the section was meant to apply to persons assisting a bankrupt in the concealment of his goods on behalf of the bankrupt himself, but not to a case of debtor and creditor. Still, looking to the words of the act, I am not prepared to say but that such a case as I have last mentioned may come within the terms of the section.

His lordship then commented on the evidence, and after observing that there was here no sufficient evidence of any debt existing from the bankrupt, left the two questions to the jury: first, of the concealment; and, secondly, whether the defendant had given up the goods.

Verdict for the defendant.

Bompas Serjt., *Erle*, and *Barstow* for the plaintiffs.

Crowder and *Kinglake* for the defendant.

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CASES

ARGUED AND DECIDED

AT NISI PRIUS

IN THE QUEEN'S BENCH,

AT THE SITTINGS AFTER

MICHAELMAS TERM,

1 VICT. 1837.

 SITTINGS IN Q. B. AFTER TERM AT
 WESTMINSTER.

 WESTMINSTER.
 Dec. 1.

 DOE dem. LONDON DOCK COMPANY
 v. KNEBELL et UX.

Where directors of a company granted a lease, with a power of re-entry, and afterwards the company was incorporated by an act of parliament, which (amongst other things) enacted, "that all contracts, &c. theretofore entered into with the directors of the company shall be as valid and effectual, to all intents and purposes, as if the company had been incorporated when the same contracts, &c. were entered into, and as if the same had been entered into with the said incorporated company:" Held, that the incorporated company might support ejectment on the clause of re-entry.

EJECTMENT by virtue of a proviso for re-entry on breaches of covenant contained in a lease to one *Margrave*, under whom the defendants claimed.

The *London Dock Company* were established by act of parliament, 39 & 40 G. 3. c. 47., and by a subsequent act (49 G. 3. c. 156. s. 5.) it was

which (amongst other things) enacted, "that all contracts, &c. theretofore entered into with the directors of the company shall be as valid and effectual, to all intents and purposes, as if the company had been incorporated when the same contracts, &c. were entered into, and as if the same had been entered into with the said incorporated company:" Held, that the incorporated company might support ejectment on the clause of re-entry.

enacted, "that it should be lawful for the directors of the said company, or any thirteen or more of them, to sell, dispose of, or to let out or demise on leases or at rack rent, any part of the lands, &c. conveyed to the company in pursuance of the former acts."

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v.
KNEBELL
et Ux.

The lease in question bore date 12 *January*, 1813, and was made by thirteen of the directors of the company (acting in pursuance of the last cited act of parliament) to *Margrave* for a term of sixty years; and it contained a clause of re-entry, by which it was provided, "that if the rent or any part thereof should be in arrear, &c., or in case of the breach or nonperformance of all or any of the covenants, &c., it should and might be lawful for the said *London Dock Company*, their successors or assigns, or for the directors for the time being of the said company, or any thirteen or more of them, or any person or persons authorized by and acting on behalf of the said company, their successors or assigns, or of the directors for the time being of the said company, or any thirteen or more of them, at any time or times thereafter, into and upon the said premises or any part thereof, in the name of the whole, to enter, in order and to the intent that the said *London Dock Company*, their successors or assigns, or the directors for the time being of the said company, might have again, repossess, and enjoy the said demised premises as in their first and former state, any thing herein contained to the contrary notwithstanding." By a subsequent act of parliament (9 G. 4. c. 116.) the *London Dock Company* was incorporated; and by the fourth section of that act it was enacted "that all contracts, cove-

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nants, agreements, leases, mortgages, bonds, securities, and other engagements, of what nature or kind soever, which at the time of the passing of the act should have been entered into with or by, or given to or by, the directors of the said company or any of them, or any person or persons duly authorized by them or any of them, under the authority of the said recited acts or any of them, should continue as valid and effectual, to all intents and purposes whatsoever, as if the said company had been incorporated at the respective times when the same were entered into, and as if the same had been respectively entered into with or by, or given to or by, the said incorporated company; and all such contracts, covenants, agreements, leases, mortgages, bonds, securities, and other engagements should and might be enforced by and against the said incorporated company." By section nine of the same act it was enacted, "that all and singular the docks, basins, lands, &c., and hereditaments, and all real and personal property whatever, which under or by virtue of all or any of the several therein-before mentioned acts had been from time to time purchased, &c., by or on behalf of the said *London Dock Company*, and which were then vested in the company, or in any of the directors of the said company, or any other person or persons in trust for the said company, should be and the same were thereby absolutely vested in the said *London Dock Company* thereby incorporated, to hold to them, their successors, &c."

Peacock, for the defendants, contended, that the lessors of the plaintiffs (the incorporated company)

were not competent to bring this action. The lease was made by thirteen directors of the company, before it was incorporated; and the covenants were all entered into with such directors. Those directors, therefore, or persons claiming as grantees of the reversion under them, could alone avail themselves of the clause of re-entry. The present lessors of the plaintiff did not claim as their grantees; and though it may be admitted that the act 9 G. 4. vested the property in them, it contained no words sufficient to transfer to them the right of re-entry under the proviso of this lease; and he cited *Berkeley v. Hardy*. (a)

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 Doe dem.
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LORD DENMAN C. J. (stopping Sir *F. Pollock*.)
 It appears to me that the language of the fourth section answers the objection; the effect of that section is, that the lease is to be considered in the same light as if it had been made by the incorporated company; and if it had been, it is admitted the present action would be maintainable.

Verdict for the plaintiff.

Sir *F. Pollock* and *Robinson* for the plaintiff.
Peacock for the defendant.

(a) 5 B. & C. 355.

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GUILDHALL,
Dec. 12.

RAWLINS and Another, Directors of the Eagle Insurance Company, v. DESBOROUGH, Secretary to the Atlas Assurance Company.

Declaration on a policy of insurance averred that the person insured was in good health; plea, that he was in bad health, with a verification. Replication, that he was in good health, as averred in the declaration, and concluding to the country: Held, that plaintiff has the right to begin.


Only one counsel on each side is to be heard on the claim of right to begin, and the counsel for the defendant has the right to reply.

THIS was an action on a policy of insurance on the life of *John Cochrane*, effected the 24th day of *September*, 1836, for the sum of 4000*l.*, for the term of four years.

The declaration stated, that the policy was made on the basis of a certain declaration of the plaintiffs which was set out, stating (amongst other things) the usual particulars as to the constitution and habits of the said *John Cochrane*, and that the said *John Cochrane* was at the time in good health, and it was then averred that the said declaration was in all respects true. There were several pleas and issues joined thereon, in which the affirmative was on the defendant; but on his counsel claiming a right to begin,

Sir *John Campbell*, for the plaintiffs, relied on the issue joined on the second plea, which alleged "that the said *John Cochrane* was at the time of making the policy in bad health," and concluded with a verification, to which plea the plaintiffs had replied, "that the said *John Cochrane* was in good health, as in the said declaration is alleged," and concluded to the country. He urged, that it was a condition precedent to the plaintiffs' right to recover, that they should shew *Cochrane* to have

been in good health ; therefore, the plea that he was not in good health, but was in bad health, was a mere negation of the declaration. As there is no presumption of good health, the plaintiffs must prove that averment in the declaration. Unless the plaintiffs give evidence, the defendant will be entitled to a verdict ; the affirmative, therefore, lies on the plaintiffs.

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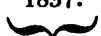
On Sir *F. Pollock* rising to support the argument for the plaintiffs,

LORD DENMAN ruled, that only one counsel on each side had a right to be heard ; and on a further question arising as to the right to reply, his lordship ruled, that as it was the claim of the defendant, *Wilde* Serjt. had a right to reply.

Wilde Serjt. The plea avers that *Cochrane* was in bad health, and concludes with a verification, not to the country. The plaintiffs only repeat the allegation of their declaration ; but it is not these allegations, but the traverse ultimately taken, which fixes the burthen of proof, and with it the right to begin. Here, unless the defendant supports his plea, which the plaintiffs have traversed, the plaintiffs will be entitled to the verdict.

LORD DENMAN C. J. It lies on the plaintiffs to establish that which is the very condition of the insurance, namely, that the party whose life is insured was in good health. The plaintiffs, therefore, are entitled to begin.

Verdict for the plaintiffs.

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 and ANOTHER.
 v.
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Sir J. Campbell A. G., Sir F. Pollock, and
 Wightman for the plaintiffs.

Wilde Serjt., Sir W. Follett, and R. V. Richards,
 for the defendant.

A rule for a new trial is pending on other
 points.

WESTMINSTER,
 Dec. 21.

The QUEEN v. DODSWORTH.

Wright
John Clerk
of Stockport
Man. c.
q. 2. 33.

Where a party, registered amongst the voters for a county, as a *sol.* occupier, had ceased before the election to occupy the premises for which he was so registered, but had entered on the occupation of other premises of equal value, —such party has no right to vote.

THIS was an indictment against the defendant, a voter for the county of *Middlesex*, founded upon the 58th section of the Reform Act (stat. 2 W. 4. c. 45.), for falsely and wilfully stating at the last election for that county, in answer to the third question there put to him by the poll clerk (as directed by the act of parliament), viz. "Have you the same qualification for which your name was originally inserted in the register of voters now in force for the county of *Middlesex*?" that he had; whereas he had not.

Plea, Not Guilty.

The facts of the case appeared to be, that the defendant was put upon the register in the autumn of 1836, in the following form :

Name.	Place of Abode.	Nature of Qualification.	Where situate.
Dodsworth, Wm.	Turnham Green.	£50. a year and upwards.	Turnham Green.

At the time of the registration the defendant was occupying a house at *Turnham Green*, as tenant to

a Mr. *King*, at the rent of 60*l. per annum*. He left that house at *Lady Day* 1837, but in *April* commenced the occupation of another house at *Turnham Green*, as tenant to a Mr. *Lawless*, at a rent of 50*l.* and upwards *per annum*, and he was in occupation of this last-mentioned house from *April* until and at the time of his polling and making the statement complained of in the indictment.

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Sir *W. Follett*, for the defendant, contended, that the circumstance of his having discontinued the occupation of the house for which he registered did not destroy his qualification, so long as he occupied another house of adequate value, within the same local limits as that described in the register. The voter is not asked, "whether he occupies the same house" as that for which he registered; but whether he is in possession of "the same qualification." Now, the qualification is, being a 50*l.* occupier, and that qualification the defendant did in fact retain when he answered the question at the election. There is, at all events, no express provision to prevent the party from voting; and it had been held by more than one committee of the House of Commons, that, notwithstanding the change of occupation, the tenant at 50*l.* a year was entitled to vote; and he referred to the *Southampton* case. But supposing the defendant to have been in error in the construction which he put upon the act of parliament; it was at all events very excusable for him to be in error, for this is just one of the very points of doubt to clear up which an act of parliament was two sessions ago brought into parliament. He also submitted that there was here

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no evidence as to what the occupation was, in respect of which the defendant was in fact registered ; nay, it was consistent with the terms of the registration, that he was registered as a leaseholder not in occupation, under s. 20.

LORD DENMAN C. J., in summing up the case to the jury, said, As the register is silent as to the precise nature of the voter's claim, it is matter to be explained by evidence what that claim really was ; and here that explanation has been given by shewing that at the time of the registration the defendant was occupying a house at a rent of 60*l.* as tenant to Mr. *King*. It is also in evidence, that at the time of his being questioned by the poll clerk he had ceased to occupy that house ; but for the defendant it is contended, that he, nevertheless, did not answer falsely in saying, that he then possessed the same qualification, inasmuch as he did at that time occupy another house of the same value ; and I am appealed to to give my opinion, whether the defendant was not, under such circumstances, entitled to vote. Now, upon that point, I certainly do not entertain the least doubt whatever. In my opinion, if a voter ceases to occupy the premises in respect of which he registered, he thereby ceases to have a right to vote. It is no answer to say, that although he had ceased to occupy those premises, he had entered upon the occupation of other premises of equal value. I take it the revising barrister was meant to decide upon the question of value, and all other matters incidental to the right of voting ; but if the party is to vote in respect of other premises, acquired since the revision

of the lists, the whole matter of fact must be opened again, and there is no tribunal before which it can be done. It seems to me to be impossible that such could have been the meaning of the legislature. But still the term "*same qualification*" is undoubtedly an equivocal expression ; it almost necessarily implies a matter of opinion ; and as the defendant retained a qualification of the same nature, it is possible he may have thought he was speaking truly when he answered that he retained the same qualification. You must be satisfied that he was stating what he knew to be false, before you can convict him on this indictment.

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Acquittal. (a)

The *Attorney General*, *Erle*, and *Busby* for the prosecution.

Sir *William Follett* and *Bodkin* for the defendant.

(a) The same point arose in the *Queen v. Irving*, tried before Mr. Justice *Bosanquet* at the last Spring Assizes for *Taunton*. The indictment was framed under the same section of the Reform Act, the qualification on the register being that of an occupier of a 10*l.* house in *Bath* ; whereas in point of fact the defendant had quitted, before the time of the election, the house which he occupied at the time of the registration, but had commenced the occupation of another house of sufficient value to confer a qualification to vote. His Lordship was decidedly of opinion, that in point of law the qualification was not the same, but said, that if the answer was given by the prisoner under a *bond fide* belief that he still retained his qualification, he should be acquitted. The jury, however, convicted the prisoner.

The decisions of the different committees of the House of Commons upon this subject will be found more reconcilable

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with each other, than can always be safely predicated of those tribunals. The point came before the committee sworn to try the merits of the *Rochester* petition, in the first session after the passing of the Reform Act. The committee decided, that a 10*l*. householder, removing after the registration and before the election to another house of equal value, thereby lost his qualification, and was not a good voter, (K. & Omb. 109.), and a similar decision was also pronounced by the *Worcester* committee (Ib. 240.) and the *Horsham* committee (Ib. 271.) See also *Sherry's* case, before the *Southampton* committee, in the same session (Cockb. & R. 125.)

A case somewhat differing from the foregoing came before the *Ipswich* committee in the present session (1838). The voter there occupied the house for which he was registered up to *Michaelmas* 1836; he then removed to another house; but on the 6th *July* 1837 he returned to his former house (for which he had been registered) under a new tenancy, and was occupying it under that new tenancy at the time of polling. It was resolved that the vote was a good one (Falc. & Fitzh. 278.)

Another point, connected with the question of change of qualification, must be of frequent occurrence in practice, but nevertheless seems scarcely to have been yet settled by any judicial decision:—A voter is registered for “land,” described to be in his own occupation, or for “freehold houses,” in some specified street. After the registration, and before the election, he sells part of the land which was in his own occupation at the time of registration, or some of the houses of which he then possessed the freehold; in each case, however, retaining enough, in point of value, to confer a qualification. Can the voter in these cases safely answer in the affirmative the third question proposed in the 58th section of the act—“Has he the same qualification for “which his name was originally inserted in the register of “voters?” There can be little doubt that voters so circumstanced are constantly voting at elections, and indeed, in the *Taunton* committee of the present session, it was admitted that they had a right to vote, (*Savary's* case, not yet reported.) Yet it may be doubted whether such a party could truly answer the question in the affirmative, if the terms of the question, and particularly the words in italics (*specifying in each case the particulars of the qualification as described in the register*), are adverted to. And it is obvious that there

is great liability to abuse, if the voter is thus left at liberty to decide for himself how much of the registered qualification he can part with, and yet retain enough to keep his vote. The observation of the Lord Chief Justice in the principal case would seem to apply, that the question of value is thereby removed from the only tribunal that the legislature has appointed to try it, viz. that of the revising barrister. In the *Droitwich* case (1 K. & Omb. 53.), where it was proved that an outgoing tenant continued, according to the custom of the country, to occupy a portion of the premises for which he was registered, that portion being of sufficient value to confer the franchise, it was decided by the committee that he was entitled to vote. But this decision can hardly be supposed to settle the general question; and it is to be hoped that when any act shall be passed for the settlement of doubtful points in the law of elections, this, amongst others, will be set at rest.

It may be observed that the old *Scotch* law of elections sometimes gave rise to a question of the same kind.—The right of election (for the counties and stewartries) was vested in persons holding lands of the king *in capite* of 40s. of old extent, or 400l. Scots of valued rent at the least, whose names were inserted in a roll made up at the annual meeting of the freeholders. If a voter parted with some of his estate after such enrolment, he might present a claim to the court of freeholders, stating the fact, and praying that his qualification might be restricted to that part of his estate which he retained. And it appears from the arguments on both sides in the *Kircudbright* case, (1 Peck. 452. 459.) that the voter was entitled to keep his name upon the roll, even without going through this form, provided he kept a sufficient part of his land to give the qualification. In the last-mentioned case a difficulty arose by reason of a voter having refused to take the oath called “the Oath of Trust and Possession,” imposed by stat. 7 G. 2. c. 16., the officer having filled up the blank left in the form of oath, as to the lands, by inserting *all* the property for which the voter had been enrolled. The voter refused to swear that the lands (so described) were in his possession, as he had parted with some since the enrolment, retaining however more than enough to give the franchise. The Committee, after a very elaborate argument, decided that the vote was a good one.

1837.

The QUEEN
v.
DODSWORTH.

1837.



CASES

ARGUED AND DECIDED

AT NISI PRIUS

IN C. P. & EXCHEQUER,

AT THE SITTINGS AFTER

MICHAELMAS TERM,

1 VICT. 1837.

LONDON,
Dec. 18.

ADJOURNED SITTINGS IN THE COMMON PLEAS.

WILSON *v.* BUTLER.—Same *v.* HOADLEY.

Special jurors
are to be paid
by the party
who moved
for the special
jury, though
(to ensure a
trial) the other
party may have
summoned
them.

THESE were both special jury cases. In the first case, the special jury (though moved for by the defendant) had been summoned by the plaintiff; and a verdict having been returned for the plaintiff,

Wilde Serjt. appealed to the Lord Chief Justice to say, whether the defendant ought not to pay the jury. He understood some doubt had been raised on the point; but as it was clear that, under the Jury Act (6 G. 4. c. 50. s. 30.) the case could only be

tried by the special jury, when once struck, the plaintiff was under the necessity of summoning them in a case where, as in the present, the other side had failed to do so.

1837.
WILSON
v.
BUTLER.
SANE
v.
HOADLEY.

Erle, for the defendant, suggested, that as the defendant had taken no steps to summon the special jury, it was incumbent on the plaintiff to pay them, he having for his own security, chosen to bring them there.

TINDAL C. J. You, the defendant, have compelled the plaintiff to bring them here, by first striking the jury, and then delaying to summon them until the last moment. I am of opinion the defendant should pay them.

In the second case,

Crowder, for the defendant, said, that his client had, three or four days before the trial, given the other side express notice that he did not mean to try the cause by a special jury. If, after that, the plaintiff chose to summon them, it was clearly *his* jury, and not the defendant's; but,

TINDAL C. J. said, it was too late to abandon it; the special jury, being once struck, the statute is imperative that the cause shall be tried by that jury, and by none other. It was, therefore, incumbent on the plaintiff, in order to secure his cause being tried at all, to summon the special jury; it is the defendant's jury, nevertheless, and he must pay them.

1837.

The defendant, accordingly, in both cases, paid the jury.

WILSON

v.

BUTLER.

SAME

v.

HOADLEY.

Wilde Serjt. and Whateley for the plaintiff.

Erle for the defendant Butler—Crowder for the defendant Hoadley.

Liver Acrali Co. v. Johnson
22. 9 Ex. 339.

GUILDHALL,
 Dec. 13.

BRIND v. DALE.

A town-carman, not conveying goods from any one known *terminus* to another, nor at any fixed rate, nor the goods of several persons at the same time, but plying in the streets, and undertaking jobs as he can get them, is, not a common carrier.

ASSUMPSIT against the defendant as a *common carrier*.

The declaration stated, that the defendant was a common carrier of goods and chattels in and by a certain cart from divers places to divers other places; that the plaintiff delivered a trunk to the defendant, to be taken care of, and safely and securely conveyed by him, as such common carrier, in and by his said cart, from a certain place, to wit, *Nicholson's Wharf*, to a certain other place, to wit, to *Brook's Wharf*; and that in consideration thereof, and of certain reward to the said defendant payable in that behalf, he undertook to take care of the trunk, and safely and securely to carry and convey it from the place aforesaid to the place aforesaid. Breach, that he omitted to do so; and that, on the contrary thereof, the trunk, by his negligence in that behalf, became and was wholly lost.

Pleas, 1st. That the defendant was not a common carrier. 2d. *Non assumpsit*. 3d. That the plaintiff did not deliver the trunk to the defendant

to be taken care of, and carried and conveyed by him, as such common carrier, *modo et formâ*. 4th. That the trunk was not lost by the negligence of the defendant. (a)

1837.


 BRIND
v.
DALE.

The plaintiff took issue on these pleas.

It appeared that the defendant was the owner of several carts, with which his servants were in the habit of plying for employment in the neighbourhood (chiefly) of the wharfs on the river *Thames*. It was not proved that they conveyed goods from any one known *terminus* to another, or that they received into their carts, on one occasion, the goods of several distinct employers; or that they conveyed goods for any fixed and known rate of remuneration: they were in the habit of undertaking jobs as they could get them, making their bargain according to the quantity of goods to be removed, and the distance. One of the witnesses said, the defendant was what was called a *town carman*. It appeared that the plaintiff arrived at *Nicholson's Wharf* (near the *Tower*) in a steamer from *Ramsgate* some evening in *November 1837*, bringing with him the trunk in question, and several other packages. Two of the defendant's carts were on the stand, near the wharf, attended by a

(a) There was also a special plea alleging that at the time of the delivery of the trunk to the defendant, he received it on the express condition that the plaintiff should himself accompany the cart, &c.; and that the loss arose from his neglect in that behalf. There was a demurrer to this plea, and the Court of Exchequer held it to be a bad plea, inasmuch as it amounted to the general issue. (See the plea and the judgment, 2 M. & W. 775.)

1837.

BRIND

v.

DALE.

carter and the defendant's foreman. The plaintiff applied to the foreman, asking for what sum he would carry the plaintiff's luggage in one of the carts from *Nicholson's Wharf* to *London Bridge Wharf*, there to take in sundry other packages of the plaintiff, and convey the whole to another wharf called *Brooke's Wharf*. It was agreed that the job should be done for 4s. 6d. The goods (including the trunk in question) were thereupon loaded in one of the defendant's carts, the defendant's foreman giving the plaintiff to understand that *he*, the foreman, must return to mind the other cart, and that, as it was dark, the plaintiff should walk behind the cart in which his luggage was placed, for the purpose of watching it. The plaintiff answered that he would. The cart then proceeded to *London Bridge Wharf*, and thence to *Brooke's Wharf*, the defendant's carter, who drove the cart, walking by the side of his horse. When the cart reached *Brooke's Wharf*, one of the plaintiff's trunks was missing, and there was reason to infer from the plaintiff's conduct, that he had not walked behind the cart, as he said he would do.

For the defendant it was contended, 1st. that there was no evidence that he was a common carrier at all, still less that the trunk was delivered to him in that character; it was delivered to him under a special contract, involving a much less measure of responsibility than that which attaches by law to a common carrier. 2dly. The loss was attributable to the plaintiff's own negligence in not duly watching his luggage, as he had undertaken to do.

For the plaintiff it was answered, that as the defendant kept carts on the stand plying for hire, to be used by any one who chose to employ them, he was within the meaning of the term *common carrier*, and that it could make no difference whether his carts went habitually from one known *terminus* to another, or whether the *termini* varied from time to time, as the occasion might require. And on the second point, it was submitted that the defendant would be answerable for the loss of the trunk, even if the jury should be of opinion that the plaintiff agreed to accompany it for the very purpose of looking after it, and *Robinson v. Dunmore* (a) was cited as an authority to that effect; and the case there cited by *Chambre J.* of a passenger by a stage coach who took his portmanteau with him, and had his eye upon it, and where the carrier was, nevertheless, held responsible for the loss of it.

1837.

 BRIND
 v.
 DALE.

LORD ABINGER C. B. expressed a very strong opinion that the defendant could not, upon the evidence, be deemed a common carrier; but he offered to leave that question to the jury, if the plaintiff's counsel wished him to do so. The plaintiff's counsel, however, declined this, preferring that the court should deal with it as a matter of law upon the evidence as it stood. His Lordship then told the jury, that though he entertained a very strong opinion that the defendant was entitled to their verdict on the first plea, which denied

(a) 2 Bos. and Pull. 416.

1837.

BRIND

v.

DALE.

that he was a common carrier; yet, to save expense to the parties, they might, for the present, assume that he *was* a person of that description. The questions then upon the evidence would be, 1st. Did they believe that the plaintiff had undertaken to watch the cart by walking behind it and had failed to do so? The Court of Exchequer had already expressed their judgment, that if the fact were so, it was an answer to this declaration on the general issue, inasmuch as the promise of the defendant was, in that event, a conditional one. (a) 2dly. Did the loss arise from the negligence of the plaintiff himself, in not performing his part of the agreement, or from the negligence of the carter? If they thought the former was the true state of the case, the defendant would be entitled to their verdict on the fourth plea.

The jury found a verdict for the defendant on all the issues but the first, which was not left to them.

Thesiger and *Barstow* for the plaintiff.

Cresswell and *W. H. Watson* for the defendant.

(a) See 2 Mees. & W. 775.

1837.



BOWMAN and Another v. HORSEY.

GUILDHALL,
Dec. 13.

TROVER for calico prints.

Plea, Not Guilty.


2nd, That the supposed conversion consisted in the defendant's having sent the prints aboard a certain ship, and that the defendant committed that act with the leave and licence of the plaintiff.

Evidence of the usage of trade is admissible to shew the meaning of ambiguous words in a packer's receipt for goods.

Replication, *de injuriâ*.

The plaintiffs were dealers in calico prints; the defendant a packer in the city of *London*. The plaintiffs having sold the prints to one *Makinson*, who bought them for exportation, the plaintiffs sent them by his direction to the defendant, that certain processes might be gone through with them in the way of the defendant's trade; and upon that occasion the plaintiffs sent to the defendant for his signature, and he signed, and returned to the plaintiffs, the following receipt-bill:—"Received on account of *Bowman* and *Lay*, for *J. Makinson* [the receipt-bill then specified the goods], "signed, *J. Horsey*." The plaintiffs some time afterwards, being dissatisfied with *Makinson*, sent to the defendant, desiring he would not part with the goods without their further orders; but the defendant had already shipped the goods in *Makinson's* name, and by his order.

Sir *W. Follett* for the plaintiffs, admitting the terms of the instrument to be obscure, offered evidence to shew that the meaning of it, according to

1897.

 BOWMAN
 and ANOTHER
 v.
 HORSEY.

the general usage of the trade, was, that although the defendant was to attend to the directions of *Makinson*, the vendee, as to preparing and packing the goods, yet he was to hold them still subject to the further orders of the plaintiffs, and not to part with them without their authority.

Maule objected to this evidence. The contract entered into by the defendant is very clear and intelligible on the face of it. By that contract he is to hold the goods "for *Makinson*." It is now sought to explain away this, and shew that he was to hold them "for the plaintiffs;" this is simply contradicting the written instrument.

LORD ABINGER C. B. There is an ambiguity in the language of the instrument; the defendant is to hold them for one person, and yet on account of another. I think this falls within the general rule, that upon a mercantile instrument you may give evidence of usage in explanation of an ambiguous expression.

The evidence was received, and several packers in the city were called, who deposed that it was not uncommon for packers to sign receipt-bills in this form; and that the usage in such cases was, not to part with the goods without the vendor's further orders.

The jury found a verdict for the plaintiffs.

Sir *W. Follett*, *Kelly* and *Peacock* for the plaintiffs.

Maule and *Channel* for the defendant.

CASES

ARGUED AND DECIDED

AT NISI PRIUS,

IN Q. B.

AT THE SITTINGS AFTER

HILARY TERM,

1 VICT. 1838.

SITTINGS AFTER HILARY TERM. *Plea in Arbutnot*
20. K. J. N. S. Chy 274.

CLARKE v. WATERTON.

1838.

WESTMINSTER.
Feb. 5.

REPLEVIN for taking two horses of the plaintiff in a certain stable in the parish of *St. George's, Hanover Square*.

Avowry, that the plaintiff held the stable as tenant to the defendant at a weekly rent of 10s., and distress for arrears of the said rent.

Plea in bar traversing the tenancy, and issue thereon.

The stable in which the distress was taken was part of premises occupied by the defendant, for

might distrain for the part so occupied, and that A. was precluded in disputing his title.

Where A. took a lease in writing in his own name of certain premises, and subsequently occupied part only, and paid rent for so much as he occupied to B., as whose agent he in fact took the lease: Held, that B.

1838.
CLARKE
v.
WATERTON.

the purpose of his business. The plaintiff, who drove an omnibus, occupied the stable and a standing for his omnibus, and had paid the defendant rent for thirteen weeks at 10s. a week, and continued the occupation without giving any notice to quit. But it was contended for the plaintiff under the following facts, that he was in fact the real tenant of the whole premises under *Ponsford*, the owner, and could not be considered tenant to the defendant. When the defendant was about taking the premises, he sent the plaintiff to negotiate, and to take them in his own name, it being supposed that *Ponsford* would ask a higher rent from the defendant than from the plaintiff. Accordingly, *Ponsford* executed a lease to *Clarke* (the plaintiff) from the 25th *December* 1836, which *Clarke* executed in his own name, but the defendant took possession of the premises, and thereupon let the plaintiff into possession of the stable and standing, at the weekly rent before-mentioned. Shortly after the lease, *Ponsford* found out that *Waterton* was intended to have the premises, and had received the rent from time to time from him, and had given him receipts in his own name. It was contended for the plaintiff, that under the statute of frauds no interest could pass from *Clarke* to the defendant, there being no writing between them, and that the whole interest remained in the plaintiff.

LORD DENMAN C. J. If the agreement between *Clarke* and *Waterton* was, that he, *Clarke*, should take the stable as a weekly tenant from *Waterton*, he cannot now set up the agreement between himself and *Ponsford* the landlord. If in reality he took the

premises as the agent, and for the benefit, of *Waterton*, the defendant is entitled to a verdict.

1838.
CLARKE
v.
WATERTON.

Verdict for the defendant.

Erle and *Henry* for the plaintiff.

Kelly and *Barstow* for the defendant.

BYRNE v. HARVEY.

ASSUMPSIT.

In order to let in secondary evidence of a letter, a notice to produce was proved to have been served the evening before the trial, at half past seven o'clock, at a house in *George Street, Westminster*, where one of the attorneys for the defendant lived, and where both had their office. The notice was left with a servant.

Platt objected that it was not in time.

LORD DENMAN C. J. after referring to *Doe v. Gray (a)*, and *Doe v. Spitty (b)*, cited in *Roscoe on Evidence* 7., said, he thought the notice was not served in sufficient time to allow the attorney to communicate with his client for the purpose of procuring the letters, and his Lordship refused to receive the secondary evidence.

Verdict for the plaintiff.

GUILDHALL,
Feb. 14. 1838.
Howard v. Williams
9. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25.
A notice to produce in a town cause, *Lawrence* served the evening before the trial at the residence of the attorney too late for the attorney to communicate with his client, is not in time to let in secondary evidence.

(a) 1 Stark. R. 283.

(b) 3 B. & Adol. 182.

1838.



BYRNE
v.
HARVEY.

Sir *J. Campbell*, A. G., *Erle* and *Banks* for the plaintiff.

Platt and *Bayley* for the defendant.

GUILDHALL,
Feb. 20.

STURGE v. BUCHANAN.

Where the plaintiff puts in evidence letters of the defendant, selected out of a correspondence, the defendant is not entitled to put in the intermediate letters, unless expressly referred to in those put in by the plaintiff.

THIS was an issue out of Chancery, to try the right of the defendant to a lien on a consignment of oil.

For the plaintiff, two letters written by the defendant to an agent of his abroad, were put in evidence, the second bearing date several months after the first.

Sir *W. Follett* for the defendant offered in evidence letters written on the same subject by the agent to the defendant, between the dates of the two letters which had been put in. He contended that the plaintiff had no right to select such letters as might suit his purpose, written at any interval of time, without giving the defendant an opportunity of producing the intermediate correspondence.

LORD DENMAN C. J. was of opinion that the defendant was not entitled to give in evidence any letter written by him, or by his agent, although bearing date during the interval between the two letters already in evidence, unless he could shew that the letters which had been so already put in

evidence expressly referred to those now tendered in evidence : it was not enough that they were on the same subject-matter.

1838.
STURGE
v.
BUCHANAN.

The letters were rejected.

Verdict for the Plaintiff.

Sir *J. Campbell* A. G., Sir *F. Pollock*, *Richards*,
and *Swann* for the plaintiff.

Sir *W. Follett* and *Wightman* for the defendant.

CASES

ARGUED AND DECIDED

AT NISI PRIUS

IN THE COURT OF
COMMON PLEAS,
AT THE SITTINGS AFTER
HILARY TERM,
1 Vict. 1838.

1838.

SITTINGS IN C. P. AFTER HILARY TERM

WESTMINSTER,
Feb. 1.

ROBINSON *v.* MUSGROVE.

A condition of sale "that if
"any mistake
"shall be made
"in the de-
"scription of
"the premises,
"or any other
"error what-
"ever shall
"appear in the
"particulars of
"the property,
"such mistake
"or error shall
"not annul
"the sale, but
"a compensa-
"tion shall be
"given, &c."

ASSUMPSIT for money had and received, to re-
cover 59*l.* the amount of deposit and auction duty,
paid by the plaintiff into the hands of the defendant,
on the purchase of certain premises sold by auction.

Plea, *Non assumpsit.*

The premises were described in the particulars
of sale as comprising "a substantial brick building,"
and also "two plots of ground, one of them in
" *Nelson Grove*, the other marked 'A,' in the plan
"annexed, abutting, as is presumed, on *Nelson*
" *Grove*. The whole estimated to let, in their pre-
"sent state, on a building lease, at a ground rent

does not apply where any substantial part of the property turns out to have no existence,
or cannot be found; or where the vendor has *malâ fide* given a very exaggerated descrip-
tion of the property. The purchaser may in such a case rescind the contract *in toto*.

" of 35*l. per annum.*" By the conditions of sale, it was (amongst other things) stipulated, that the vendor was, within ten days from the day of the sale, to deliver to the purchaser an abstract of the title. The condition No. 5. was " The plot of land marked " A," on the plan, cannot be properly identified by the vendor, by reason of the death of the party who sold to the grantor of the annuity ; but it is fairly presumed that the purchaser, by inquiry in the vicinity, will be able to ascertain the true situation, and he is to accept this plot by the description only contained in the conveyance deed of it." No. 6. " That all objections not made to the title, and delivered to the vendor's solicitor or agent, in writing, within ten days from the delivery of the abstract, shall be considered as waived." No. 9. " That if any mistake shall be made in the description of the premises, or any other error whatever shall appear in the particulars of the property, such mistake or error shall not annul the sale, but a compensation or equivalent shall be given or taken, as the case may require ; to be settled by two referees, one to be chosen by the vendor, and the other by the purchaser, or the umpire of such two referees, in case of their disagreeing ; but it is stipulated that no such compensation or equivalent shall be given or taken in respect of any such error or misstatement, unless a notice thereof be given, and a claim made in writing, within ten days after the delivery of the first-mentioned abstract."

The abstract was delivered within the stipulated time, and within ten days the plaintiff returned it with an objection, viz. that the defendant (who

1838.

 ROBINSON
 v.
 MUSGROVE.

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ROBINSON
v.
MUSGROVE.

sold under a power contained in an annuity deed) had no right to clog the sale with certain conditions introduced as to title, and that consequently the sale was not a due execution of the power of sale given by the annuity deed: and thereupon the plaintiff required a return of the deposit. Two additional objections were now made by the plaintiff's counsel: 1st, that the plot of land marked "A" could not be found anywhere; 2dly, that the premises did not answer the description in the particulars: and some witnesses were accordingly called by the plaintiff, who deposed that the messuage was not what could be called "a substantial brick building;" and that, in their judgment, the premises altogether could never let at a ground rent of 35*l.* or half that sum.

For the defendant, it was contended that all the objections, excepting that relating to the supposed impropriety of the condition as to *title*, were waived by not being made within the ten days; that as to plot "A" not being found, and as to the misdescription of the other premises, there was no ground whatever to impute fraud to the defendant; and that (in the absence of fraud) any deficiency in value was only matter for compensation, pursuant to the ninth condition, and was not sufficient cause for rescinding the purchase altogether.

TINDAL C. J. (to the jury). Without going into the question raised by the conveyancers as to the reasonableness or propriety of the condition introduced as to the *title*, there are other points now taken which will probably be sufficient for the decision of this case: for, first, if any substantial

part of the property purporting to be sold, turns out to have no existence, or cannot anywhere be found, that circumstance, in my opinion, entitled the plaintiff to rescind the contract *in toto*; even if you think that the defendant was not guilty of any fraudulent misrepresentation in that respect: deficiency in the value may be fit matter for compensation; but not the total absence of one of the things sold. Again, the particulars of sale describe the premises as “comprising a substantial brick building, and the whole premises as estimated to let on a building lease at a ground rent of 35*l*.” Was that a *bond fide* description, or not? If not—if you think that was an exaggerated description quite beyond the truth, and that the defendant was not acting *bond fide* when he gave that description of the premises, then I am of opinion that circumstance alone will entitle the plaintiff to rescind the contract even now, and to recover the deposit, notwithstanding the language of the ninth condition.

1838.

 ROBINSON
v.
 MUSGROVE.

Verdict for the plaintiff. (a)

Wilde Serjt. and *Chandless* for the plaintiff.

Atcherley Serjt. and *Channell* for the defendant.

(a) *Vide Wright v. Wilson*, Vol. I. p. 207.

1838.

WESTMINSTER,
Feb. 4.

COLLEY v. SMITH and Others.

ASSUMPSIT for money lent.Plea, *Non assumpsit*.

The defendants were four of the directors of the Patent Safety Cab Company. The plaintiff was himself a member of the company. It appeared that before the advance of the money, the defendants had borrowed 1000*l.* for the purposes of the company of one *Clarke*, and that *Clarke* held a bill of exchange with their four names upon it. That security falling due, and the defendants having no funds of the company to take it up, one of the officers of the company, on behalf (as it was said) of the defendants, applied to the plaintiff to advance the amount, telling him it was to enable the present four defendants to take up the security in *Clarke's* hands, the directors deeming it inexpedient to make a call on the shareholders. The plaintiff agreed to advance the money, if the company would first discharge a bill due to him for saddlery which he had sold to the company. The plaintiff accordingly advanced the money to the officer; and thereupon the amount of the saddlery bill was paid to the plaintiff, and the residue of the money advanced was applied to pay off the debt due to *Clarke*. It was proved that the plaintiff knew that the defendants had come under the liability to *Clarke* on behalf, and for the purposes, of the company. And the defendants put in evidence the partnership-deed of the company (executed by themselves and

Clarke of Where a mem-
ber of a joint
stock company
advanced
money to a
director of the
company,
knowing that
it was to be
applied in
taking up a
bill of ex-
change which
such director
had become a
party to, for
the purposes
of the com-
pany,—it is a
question for
the jury whe-
ther the mem-
ber advanced
the money on
the credit of
the company
at large, or on
that of the
director
individually.


by the plaintiff), by which it was (amongst other things) stipulated, that the directors should contract for and on behalf of the company ; and that they should not be individually liable for more than their respective shares in the capital of the company.

1838.
COLLEY
v.
SMITH
and OTHERS .

Under these circumstances, it was contended for the defendants that the action could not be supported. The money sought to be recovered was substantially lent to the company, and the plaintiff, being a member of the company, could not enforce his remedy against them in a court of common law.

Wilde Serjt. *contra*, insisted that it was clear on the whole case that the plaintiff advanced the money to the directors individually, and on their personal security.

TINDAL C. J. in summing up the case to the jury told them, that the only question was whether the money was lent to the four defendants, or lent to the company at large. It would require strong evidence to shew that the plaintiff (conscious of the difficulties the company were in, and knowing that he, as a partner, could maintain no action against them), advanced the money on their credit. It was for the jury, looking at the whole transaction, to say, whether or not it was a loan to the directors personally, to get them out of a difficulty, and to relieve them from the bill on which they were individually liable to *Clarke*. If it was, the plaintiff was entitled to a verdict ; but if they thought that the plaintiff was willing and agreed to advance the money to the company at large on the terms

1838.

 COLLEY
 v.
 SMITH
 and OTHERS.

stated, and to look to them alone for repayment, then their verdict would be for the defendants.

Verdict for the plaintiff.

Wilde Serjt. and W. H. Watson for the plaintiff.

Thesiger and Murphy for the defendants. (a)

(a) See the case reported on another point in 4 Bing. N. C. 285.

Maggie v. Baunister.
4 D. Newry, 432.
 WESTMINSTER,
 Feb. 9.

PENNELL v. MEYER.

If an answer in chancery is produced in evidence, the party against whom it is produced is entitled to have the whole bill in chancery read as part of his adversary's case.

CASE for maliciously, and without any reasonable or probable cause, arresting the plaintiff.

Plea, Not Guilty.

The supposed cause of arrest relied upon by the defendant arose out of a bill of exchange discounted by him for a person who, he attempted to shew, was the agent and mere tool of the present plaintiff.

To shew that this transaction afforded the defendant no reasonable cause for arresting the plaintiff, the plaintiff tendered in evidence the answer of the defendant to a bill in equity, filed against him by the drawer of the bill of exchange, to restrain an action which the defendant had brought against him.

Sir J. Campbell A. G. for the defendant, contended that if the plaintiff put the answer in evidence, he was bound also to produce and read the bill. The answer could only be used as an admission made by the defendant, as it were, in conversation; and

See terms
L.R. 2 (23) 57

of course the bill must be necessarily before the jury, as part of the conversation.

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PENNELL
v.
MEYER.

Wilde Serjt. contrd. The answer is read as an admission in writing made by the defendant on the matter which is the subject of this action. If indeed the admission, as it appears on the face of the answer, turns out to be in itself ambiguous, and to require explanation by reference to the bill, it may become necessary to read the latter; but, at present, the plaintiff relies on the answer, as in itself containing a clear statement by the defendant of matters important to be laid before the jury in this case.

TINDAL C. J. was of opinion that the interrogatory part of the bill must be read if the defendant required it. It could not be differed from the ordinary case of a conversation, in which it never could be allowed that the answers of a party should be given in evidence against him, without also giving in evidence the questions which drew forth those answers. As to the residue of the bill, his Lordship expressed some doubt; but, upon its being suggested by the *Attorney General* that a defendant in equity is bound to answer the *narrative* part of the bill, as well as the part technically called the *interrogatory* part, his Lordship said he thought he must order the whole bill to be read if the defendant required it, though it was certainly unusual to require this to be done; and he should tell the jury, that the statements in the bill were not to be considered as admissions of the facts so stated, it being notorious that allegations, not corresponding with the facts, were frequently introduced into

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bills, for the purpose merely of eliciting the truth from the other party.

The bill and answer were accordingly both read as part of the plaintiff's case.

Verdict for the defendant.

Wilde Serjt., *Kelly*, and *Chandless* for the plaintiff.

Sir *J. Campbell* A. G., *R. V. Richards*, and *Arnold* for the defendant.

In Easter Term *Wilde* Serjt., upon other grounds, obtained a rule to shew cause why the verdict should not be set aside, and a new trial had, which rule is still pending.

GUILDHALL,
Feb. 14.

GATLIFF v. BOURNE and Others.


In a special jury cause the plaintiff may have a *tales* without the consent of the defendant.

THIS was a special jury cause, and on only four of the special jurymen appearing,

Wilde Serjt. for the plaintiff, prayed a *tales*.

Swann for the defendants, objected that this could not be done without the consent of the defendants, which he refused; and he cited 1 Starkie on Evidence, 540., where the case of the *British Museum v. White*, 3 C. & P. 289. is referred to, in which *Park J.* ruled that the defendant's consent was necessary.

Wilde Serjt. said he was in that case, and that he did not recollect such a decision ; and he was quite confident that so important a point, and so contrary to the universal impression of the profession, could not have escaped him. The language of the statute is decisive. (a)

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 GATLIFF
 v.
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 and OTHERS.

TINDAL C. J. Whatever respect I may have for the opinion of the learned judge who is said to have given that decision, I must here act on my own opinion. My opinion is, that no consent is necessary. The cause must therefore proceed ; and if the defendants' consent be necessary, the defendants will be able to resist this as a mistrial.

Verdict for the plaintiff.

Wilde Serjt., *Stephen* Serjt., *Platt*, and *Crompton*, for the plaintiff.

Kelly, *Wightman*, and *Swann* for the defendants.

(a) See the Jury Act, 6 G. 4. c. 50. s. 37.

ROBERTSON v. WYLDE.

GUILDHALL,
 Feb. 24.

CASE for a libel. Plea, Not Guilty.

The defendant was a bookseller, and the publisher of a periodical called the *Railway Magazine*, in which the libel complained of was published. It appeared on the back of the magazine that it was edited by one *Herapath*, and it was alleged by

In an action for libel against the publisher of a magazine, evidence of the writer's personal malice against the plaintiff is inadmissible.

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the plaintiff that that person was the writer of the article in question.

Wilde Serjt. for the plaintiff, proposed to give evidence of personal malice on the part of *Hera-path* against the plaintiff, who was the secretary to the Eastern Counties Railway Company. The libel professed to comment on some transactions of the Company, in whose service *Hera-path* had formerly been.

Erle objected that the evidence was inadmissible; saying that the defendant, the bookseller, was only liable for the actual damages resulting from the libel, and could not be charged with vindictive damages on account of the malice of the supposed writer. If the plaintiff had chosen, he might have obtained the name of the writer, and sued him; in which case he would have been made answerable for his own malice.

Wilde Serjt. *contra*. The action is in fact the action of *Hera-path*: the defendant himself publishes the libel, stating in the very front of it that *Hera-path* was the author: he has thereby identified himself with *Hera-path*.

TINDAL C. J. ruled that the evidence was inadmissible.

Verdict for the plaintiff, 40s. damages.

Wilde Serjt., Sir *W. Follett*, and *Channell* for the plaintiff.

Erle and *Ogle* for the defendant.

1838.

SPRING ASSIZES, 1 Vict.

YORK.

Coram PATTESON J.

Pole & Palmer.
J. Mee. & W. 77.

Alger & Latham.
J. Phillips. 163. S.C. 8. Jan. 411.

STANLEY v. JOBSON.

York,
March 5.
Wilkinson, Mayor.
W. J. 2. B. 52.

THIS was an action by the payee against the maker of a promissory note.

For the defendant a witness was called, who, on the *voire dire*, admitted that he was a joint maker with the defendant of the promissory note, the defendant having signed it as his surety.

Alexander objected that the witness was incompetent. He had a direct interest in procuring a verdict for the defendant; for if the plaintiff obtained it, he, the witness, would be liable to indemnify the defendant, not only against the amount of the note, but also against the costs of the action.

Where a witness would be liable to indemnify the defendant, not only against the damages and costs to be recovered by the plaintiff, but also against the defendant's own costs, he is not competent for the defendant, nor can he be made so by indorsement on the *postea* under the stat. 3 & 4 W. 4. c. 42. s. 26.

Cresswell, contrd. The witness is a joint maker of the note, and a party primarily liable upon it: he is clearly bound to pay the amount either to the defendant, or to the plaintiff, the payee: his interest, so far as the principal sum goes, is neutralized. As to the costs of this action, *non constat* that the witness would be liable to pay them, even in the event of the plaintiff's obtaining the verdict: a surety has no right to defend the action

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STANLEY
v.
JONSON.

unnecessarily, and then call upon the principal debtor to reimburse him. Besides, the recent statute 3 & 4 W. 4. c. 42. s. 26. expressly applies to a case of this kind, and restores the competency of the witness by having the postea indorsed.

PATTESON J. It is true the witness may not necessarily be liable to the costs of this action, in the event of the verdict passing against the defendant; but the question is, whether there is not a presumption of his being so liable? I think the witness is *primâ facie* liable to indemnify his surety against the costs, and that is, I think, sufficient to render him incompetent. Then does the statute get rid of the objection? I think it does not. If the objection were only that the verdict could be used in evidence, I could indorse the postea, and so remove the objection. But the witness is under a liability quite independent of this verdict. He may be liable to repay the defendant, not only the damages and costs, to be recovered against the present defendant, by the verdict and judgment in this case, but also the defendant's *own* costs. I do not see how my endorsing the postea can get rid of that objection.

The defendant then produced a release; but the language of it being defective, the witness was rejected.

Verdict for the defendant. (a)

Alexander and *Knowles* for the plaintiff.
Cresswell and *Baines* for the defendant.

(a) See the next case (*Green v. Warburton.*)

*Alvies v. Latham.
1. Phillips. 183. S.C. 8. per 4/11.*

GREEN v. WARBURTON.

1838.

YORK,
March 7.

TRESPASS for breaking and entering a house, damaging furniture, &c.

Plea as to part, payment of money into court; as to other part, Not Guilty; as to other part, that the furniture belonged to *I. S.*, and that the defendants entered and committed the alleged trespass thereto by the command of *I. S.*

Replication (protesting the command) *de injuriâ absque residuo &c.*

On the defendant's calling *I. S.* as a witness, *Cresswell* for the plaintiff objected that he was not a competent witness. 1st. He had a direct interest in the subject matter of the action, for he came to prove that the goods belonged to himself. 2dly. He had an interest in the result of the suit; for if the plaintiff recovered against the defendant, the witness would be liable over to the latter for the damages and costs.

Alexander and Watson contra—The witness has no interest in the subject matter of the action, which is merely brought to recover damages for an injury to goods; and even if the right to the goods be deemed the subject matter of the action, the witness has no interest; for the verdict (for which-ever party it be given) cannot affect the right of the witness: if the verdict be for the plaintiff, the witness may still in any other action set up his own title; if the verdict be for the defendant, the plaintiff may still set up *his* title against the witness.

Where a defendant justified a trespass to chattels by a plea alleging them to be the property of *I. S.*, and that he committed the trespass by the command of *I. S.*, Held, that *I. S.* was not a competent witness for the defendant, and that he could not be rendered competent by indorsing the *postea* under stat. 3 & 4 W. 4. c. 42. s. 26.

*Milbank v. Major.
20. L. J. 2. B. 22.*

*Bole.
Pitney.
20. L. J.
Inch 26.
12. 9. 71.*

1838.

 GREEN
 v.
 WARBURTON.

Ward v. Wilkinson. (a) Then as to the other ground of objection, the recent statute 3 & 4 W. 4. c. 42. s. 26. is an answer. The defendant could not recover against the witness, without relying on this record; and by the indorsement on the record, he will be estopped from so doing.

PATTESON J. The case is distinguishable from *Ward v. Wilkinson*: there, both parties, plaintiff and defendant, claimed adversely to the witness; one party claimed as assignees of a bankrupt, the other as purchasers under his execution-creditor; but the witness disputed the bankrupt's title altogether. Here the defendant justifies under the witness: it is admitted by the pleadings that the defendant acted under his orders, and the witness would be liable to indemnify him, not only against the damages and costs to be recovered by the plaintiff, but also against the defendant's own costs. In respect of those costs, the witness may be made liable to the defendant, without the aid of the record in this action: that constitutes an interest which cannot be removed by indorsing the *postea*. It is like the case which was tried the other day. (b)

The witness was rejected.

Verdict for the defendant.

Cresswell and *Wightman* for the plaintiff.

Alexander and *Watson* for the defendant.

(a) 4 B. & Ald. p. 410. (b) See *Stanley v. Jobson*, *antè* p. 103.

1838.

Coram COLERIDGE J.

The QUEEN *v.* SPILLING.

YORK,
March 9.

INDICTMENT for manslaughter.

The 1st count stated, that one *Isabella Turner* was pregnant with child, and that the prisoner took the care and charge of her as a man-midwife, and undertook to do everything needful for her health, and for the safe delivery of the child. The count then proceeded to charge the prisoner with ignorantly, rashly, and feloniously neglecting to do what was needful for the health of the said *Isabella Turner*, and for the safe delivery of the child of which she was pregnant as aforesaid; and with ignorantly, negligently, rashly, and feloniously and with great violence, thrusting and forcing a certain blunt instrument, called a lever, into the person of the said *Isabella Turner*, and ignorantly, negligently, rashly, and feloniously, leaving the said instrument there remaining, and thereby ignorantly, negligently, rashly, and feloniously giving to the said *Isabella Turner*, while she was so pregnant with child as aforesaid, divers mortal cuts, &c. of which she died. There were other counts varying the description of the offence.

If a medical man, though lawfully qualified to practise as such, cause the death of a person by the grossly unskilful, or grossly incautious, use of a dangerous instrument, he is guilty of manslaughter.

It appeared in evidence, that the prisoner was a person who had for nearly thirty years carried on the business of an apothecary and man-midwife in the county of *York*; that he was a person qualified by law to carry on that profession; that his practice

1838.
The QUEEN
v.
SPILLING.

had been very considerable; and that (amongst others) he had attended the deceased herself on the birth of all her children. It appeared, that on the occasion in question, he made use of a metal instrument, known in midwifery by the name of a *vectis*, or *lever*, inflicting thereby such grievous injuries on the person of the deceased, as to cause her death within three hours; and it was proved by the evidence of medical men, first, that the instrument used was a dangerous one, and that at that period of the labour it was very improper to use it at all; and secondly, that it must have been used in a very improper way, and in an entirely wrong direction. There was no evidence on either side as to whether the prisoner had, or had not, ever made use of such an instrument on former occasions.

Dundas addressed the jury for the prisoner, relying on the character for skill, humanity and attention, which the prisoner had acquired; and he contended that no medical man could be made thus criminally responsible for the ill success of his practice.

COLERIDGE J. told the jury, that the questions for them to decide were, whether the instrument had in this instance caused the death of the deceased; and whether it had been used by the prisoner with due and proper skill and caution, or with gross want of skill, or gross want of attention. No man was justified in making use of an instrument, in itself a dangerous one, unless he did so with a proper degree of skill and caution. If the

jury thought that in this instance the prisoner had used the instrument with gross want of skill, or gross want of caution, and that the deceased had thereby lost her life, it would be their duty to find the prisoner guilty.

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The QUEEN
v.
SPILLING.

Verdict Guilty.

Starkie and *Wortley* for the prosecution.

Dundas and *Baines* for the prisoner.

The prisoner was sentenced to six months' imprisonment.

The QUEEN v. W. SMITH.

THIS was an indictment for forgery.

The offence was alleged in the indictment to have been committed on the 3d day of *June*, in the seventh year of the reign of King *William* the Fourth, but all the counts concluded "*against the peace of our Lady the now Queen, her crown and dignity.*"

The prisoner demurred to the indictment, and the prosecutor joined in demurrer.

Wortley, in support of the demurrer, submitted that the indictment should have concluded "against the peace of the late King," in whose reign the offence was committed; and he relied upon 2 Hale, 189. and *Rex v. Lookup* (a).

YORK,
March 13.
R. & T. Smith
Case No. 21.44.
An indictment which alleges an offence in the reign of a deceased king, and concludes against the peace of his successor, is still bad on demurrer. After judgment on demurrer an indictment cannot be quashed at the instance of the prosecutor.

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 v.
 SMITH.

Hoggins, contra. The indictment is good. It may be admitted that the conclusion is not strictly accurate ; but since the statute 7 G. 4. c. 64. s. 20. this is no longer a fatal objection. That section enacts, "That no judgment upon any indictment, " or information for any felony or misdemeanor, " whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or " reversed for want of the averment of any matter " unnecessary to be proved, nor for the omission " of the words 'as appears by the record,' or of " the words 'with force and arms,' or of the words " 'against the peace,' nor for the insertion of the " words 'against the form of the statute,' instead " of the words 'against the form of the statutes,' " &c. &c." In *Rex v. Chalmers* (a), it was decided that an erroneous conclusion *contra pacem*, is the same as *no* conclusion, and is equally cured by the statute. It is therefore clear that this would have been no valid objection after judgment. It is true that the point has never yet arisen on demurrer ; but it is submitted, that even on demurrer the objection is no longer tenable. The reason why, in ancient times, some conclusion of this kind was required was, that it might appear to whom the forfeiture accrued, *Rex v. Taylor* (b) ; and Lord *Tenterden*, in that case, insists on the propriety of still adhering to the ancient forms. But the statute 7 G. 4. in effect abolishes that ancient form, and the averment *contra pacem* may now be treated as mere surplusage. If that be so, the insertion,

(a) 1 Moody, C. C. R., 352.

(b) 3 B. & C. 502.

though in an incorrect form, of that which is in itself entirely surplusage, cannot prejudice the indictment.

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COLERIDGE, J. It is clear upon the authorities, that this objection would have been fatal at common law ; and the question therefore is simply, whether the statute 7 G. 4., relied upon by the prosecutor's counsel, has cured the objection. The statute is framed in terms confined to the case of an objection taken *after judgment*. How then can I go beyond the language of the statute, and say that the legislature meant to get rid of the objection in every case, whether taken after judgment or before judgment ? There must be judgment for the prisoner.

Judgment for the prisoner.

Hoggins then moved that the indictment might be quashed, so that he might prefer a new bill ; but

COLERIDGE J. said that, after argument and judgment, it was too late to listen to an application of that kind.

Hoggins for the prosecutor.

Wortley for the prisoner.

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YORK,
March 16.The QUEEN *v.* SWAIN and Others.

On the trial of an indictment for a riot, it is ground for the prosecutor's challenging a juror, that he is an inhabitant of the town where the riot occurred, and that he has taken an active part in the matter which led to it.

THIS was an indictment for a riot at *Bradford* on occasion of a popular meeting on the subject of the *New Poor Law Act*.

Wasney, for the prosecution, challenged two of the jurors, on the ground that they were both inhabitants of *Bradford*, and had taken active parts there in opposition to the law in question.

Dundas, for the prisoners, insisted that this was not good ground of challenge on the part of the Crown. He knew of no instance where a challenge had been allowed on the ground of the political or other opinions of the jurors.

COLERIDGE J. was, however, of opinion that an individual who had taken an active part on one side, or on the other, of a measure which had caused so much local excitement, could hardly be received as an indifferent juror. He should therefore allow the challenge if the prosecutor proved the fact.

The jurors were examined by the prosecutor's counsel on the *voire dire*, and admitted the fact in the terms in which it had been suggested at the bar.

The jurors were accordingly rejected, and two others sworn.

The prisoners afterwards pleaded guilty.

Wasney and *Ashmore* for the prosecution.

Dundas for the prisoners.

1898.
The QUEEN
v.
SWAIN
And OTHERS.

BOLDEN v. BROGDEN.

Coates - Stephens -
B. Mos. & Rob. 187
LANCASTER,
March 19.
Kiddell - Bernard
J. Ph. 1876

ASSUMPSIT on a warranty, that a horse sold by the defendant to the plaintiff was, at the time of the sale, *sound*.

It appeared in evidence that the plaintiff bought the horse at *Lancaster* fair for 100 guineas; that a few hours after the sale his father saw the horse, and observed that he had a cough upon him. The plaintiff, in consequence, let him remain a few days at the stable, where he was bought, until the weather grew milder, and then had him taken to his, the plaintiff's, home. The horse became worse, and for some days remained very ill and unfit for work, labouring under what some of the witnesses termed the "Influenza," and others the "Distemper;" the horse, however, had completely recovered long before the trial.

A slight disorder on a horse at the time of a sale, not calculated permanently to diminish his usefulness, and from which he ultimately recovers, is not an unsoundness constituting a breach of the warranty.

For the defendant witnesses were called, to prove that the horse had no disease on him at the time of the sale, except, at the most, a slight and common cold; and that the more serious disorder, spoken

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 The QUEEN
 v.
 ROGER SMITH.

but the language of the statute 12 *Anne*, st. 1. c. 7. s. 1. was different from that of the 7 & 8 *G.* 4. By the former act it was enacted, "that all and every person or persons that shall at any time, from and after, &c., feloniously steal any money, &c., being in any dwelling-house or outhouse, &c., shall be absolutely debarred of and from benefit of clergy." He submitted, therefore, that the prisoner could only be convicted of simple larceny.

Cottingham for the prosecution contended that as it was distinctly alleged in the indictment that the prisoner stole the goods, and that, at the time of such stealing, "they were in the said shop found," it necessarily followed that he must have stolen them in the shop.

PATTESON J. I think it is safer to adhere to the words of the act. In indictments for sacrilege (*a*) it is in like manner usual to allege, distinctly, not only that the offender broke and entered the church, and stole goods then being therein, but also, that he actually stole them in the church. The word "*therein*" is not found in the statute of *Anne*, but it is in this statute; and the precedents, since the passing of this act, have distinctly alleged the stealing to have been *in* the building. I think that is the correct course, and that, on the present indictment, the prisoner ought only to be convicted of the simple larceny.

Verdict, Guilty of simple larceny.

Cottingham for the prosecution.

Dr. Brown for the prisoner.

(*a*) S. 10.

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The QUEEN v. KINNEAR.

LIVERPOOL,

April 2.

Miller v. Henderson
20. L. J. C. P. 21. S. C.

INDICTMENT for forging a bill of exchange.

The first count set out the instrument (describing it to be a bill of exchange) in the following terms :

“ *Flintshire District Banking Company,*
Flint, 29th Sept. 1837.

“ 21 days after date pay (without acceptance)
“ to the order of Mr. *James Henderson*, £70.

“ For value received,

“ For the Company,

“ *J. Watkins*, Manager.”

“ To the *London and Westminster Bank,*

“ *Throgmorton Street, London.*

“ Indorsed, *J. Henderson.*”

An instrument drawn by A. upon B. requiring him to pay to the order of C. a certain sum at a certain time, “ without acceptance,” is a bill of exchange, and may be so described in an indictment for forgery.

Before the opening of the evidence, the prisoner objected that the instrument was not, upon the face of it, a bill of exchange. To constitute a bill of exchange it is essential that there should be three parties to the instrument : a person drawing, a person on whom it is drawn and who is to accept, and a person to whom the payment is to be made. Here the drawer of the instrument expressly prohibits acceptance.

Brandt and Peel contra. All that is required to constitute a bill of exchange is that there should be

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The QUEEN
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KINNEAR.

a drawer, an order by him directing some one to pay a sum of money, and a description of the person to whom that sum of money is to be paid. But, further, supposing that there should be a party empowered to *accept* the instrument, that essential to a bill of exchange is not here wanting. The words "without acceptance" are ambiguous, and do not exclude acceptance, but only require the drawee to pay when the bill is at maturity, whether it shall have been previously accepted by him or not; and this is, in truth, all that the drawer of a bill can ever do, for he never has the means of compelling the drawee to accept.

PATTESON J. This instrument certainly differs from all others that I have seen as bills of exchange, by reason of the words "without acceptance." I do not, however, consider that the insertion of those words alters the character of the instrument, so as to prevent its being a bill of exchange. All that is necessary to constitute a bill is that the party making the instrument should direct it to some other party, requiring that other party to pay the money therein mentioned to some third person or his order, or to the order of the party so making the instrument. The drawer may in each case prescribe the terms upon which the payment is to be made. Here he has chosen to prescribe that the drawee is to make the payment "without acceptance:" the meaning of which I take to be that the holder is not to be put to the trouble of presenting it to the drawee before it becomes due; but still, if he should choose to present it, there is nothing to prevent the drawee from accepting it; actual

acceptance, of course, is not necessary to make the instrument a bill of exchange. Bills are daily noted and protested as bills for non-acceptance: they must, therefore, be bills before acceptance. Bills *at sight* are not, in fact, commonly accepted.

I think, therefore, that the instrument is properly described as a bill of exchange.

The prisoner was convicted, and sentenced to transportation for life.

Brandt and *L. Peel* for the prosecution.

The prisoner was not defended by counsel.

WINCHESTER.

Coram Lord DENMAN C. J.

FOWLER *v.* DOWDNEY.


WINTON,
March 2.

SLANDER, for saying of the plaintiff "He is a returned convict."

The declaration averred, as special damage, the loss of a customer to whom the words were spoken, the plaintiff being a tradesman. The proof of the special damage failed; and thereupon,

An action will lie for saying of the plaintiff "he is a returned convict," though the words import that the punishment has been suffered.

Erle for the defendant contended that the words were not actionable in themselves, inasmuch as they imputed no present liability to punishment: for, conceding that an offence, for which transportation was the punishment, was imputed, the words imply that the party had already suffered that punishment.

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 FOWLER
 v.
 DOWDNEY.

LORD DENMAN C. J. My opinion is, that these words are actionable, because they impute to the plaintiff that he has been guilty of some offence for which parties are liable to be transported : that is, I think, the plain meaning of the words, as set out in the declaration ; they import, to be sure, that the punishment has been suffered—but still the obloquy remains.

Verdict for the plaintiff, damages 1s. (a)

Crowder and Saunders for the plaintiff.

Erle for the defendant.

(a) The test here applied to ascertain whether the words were actionable seems to be, whether they impute a species of misconduct which, in general, subjects a person to criminal prosecution in the common law courts. (Com. Dig. *Action on the Case for Defamation*, D. 5.) And the principle of that test is, not that the imputation of such a species of misconduct places the person slandered in a situation of actual danger, but that an aggravated degree of obloquy is supposed to attach to such misconduct as the law visits with punishment. Accordingly, we find that in ancient times an action for slander was holden to be maintainable for words imputing that the plaintiff had committed a criminal offence ; and no objection was raised on the ground that the speaker went on (as in the principal case,) to allege that the plaintiff had already suffered the punishment inflicted by law on such offenders. (See *Gainford v. Tuke*, Cro. Jac. 536.). The same point was raised in *Boston v. Tatum*, Cro. Jac. 622. The words spoken were that the plaintiff “ was a thief, and had stolen the defendant’s gold.” After Not Guilty pleaded, and a verdict for the plaintiff, it was moved for the defendant, in arrest of judgment, that as no time was alleged when the theft was committed, it might be it was in former times, since which divers general pardons had been, so as there cannot any loss happen to him,

(the plaintiff.) The Court overruled the objection, saying "it was a great slander to be once a thief, for, although a pardon may discharge him of the punishment, yet the scandal of the offence remains; for

'Pena potest redimi, culpa perennis erit,'"

There is one instance, frequently occurring in the old books, from which, perhaps, a different inference might, at first sight, be drawn. It is laid down that words are actionable which subject a party to punishment by the custom of the place. As, in *London*, to say of a woman living in that city, that she is a common harlot, is actionable, (that is, in *the City Court*, 1 Dougl. 380. n. 96.) by reason of the custom, supposed to exist there, of carting women of that character, (Com. Dig. *Action on the Case for Defamation*, D. 10.) It may be said that the immorality is the same, and justly exposed to the same measure of obloquy, whether the woman be living in *London* or in *Westminster*; and that it is the liability to punishment, therefore, in the one case, and not in the other, which makes the difference. But, after all, this instance will not be found repugnant to the principle before pointed out as the true one. In *London*, where such misconduct is visited with punishment, the imputation of it is supposed to be more odious and degrading than elsewhere: words conveying that imputation are, therefore, if spoken in *London*, actionable; if spoken elsewhere, not. (*Wheeler v. Welch*, 1 Lev. 116.)

1838.

FOWLER
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1838.



WINTON,
March 6.

DUNN v. ASLETT.

The counsel calling a witness who has given unfavourable evidence on cross-examination, may, on re-examination, ask him questions to show inducements to betray the party who has called him.

ASSUMPSIT on the warranty of a horse, that he was quiet in harness.

Plea, that the horse was quiet in harness, and issue thereon.

In order to prove the resale of the horse by the plaintiff, after discovery of his being vicious and unquiet, the plaintiff's counsel called a livery-stable keeper, who, on cross-examination by the defendant's counsel, stated a great number of facts, tending to shew that the horse was quiet in harness, and that the warranty had not been broken. On re-examination,

Bompas Serjt. asked the witness (who had also been subpcnaed for the defendant,) whether he had not been living with the defendant, and defendant's witnesses, since he had been in the town?

Erle objected that the plaintiff could not be allowed to discredit his own witness: the plaintiff ought not to have called him, unless he was a witness to whom credit was to be given. It is not pretended that the plaintiff was ignorant that the witness would give evidence unfavourable to him.

Bompas Serjt. said that the witness was a necessary one, for him, to one point only, and that he had been induced to betray the plaintiff by matters which had passed in the town.

LORD DENMAN C. J. In *Wright v. Beckett* (a) I expressed an opinion, formed after much consideration, that the plaintiff might shew that the witness had given a different account of the matter, by which different account he had been induced to call him. I remain of that opinion; and I think, on the same principle, a party calling a witness may examine him as to any fact tending to shew he has been induced to betray that party.

1838.
DUNN
v.
ASLETT.

Verdict for the plaintiff.

Bompas Serjt. and *Bingham* for the plaintiff.

Erle and *Saunders* for the defendant.

(a) 1 Moo. & Rob. 414.

1838.

EXETER.

*Coram BOSANQUET J.*EXETER,
March 19.The QUEEN v. BURROWS, HUDDY, and
DAY.

Where a prisoner is defended by counsel he has no right to make two statements to the jury, one by himself, the other by his counsel.

INDICTMENT for uttering base coin.

There were three counts: one for uttering to *Eliza Huddart*, and, on the same day, a second uttering to *Eliza Kidd*; and two other counts, charging single uttering to *Eliza Kidd* and *Jane Goss* respectively.

Rowe appeared in defence of *Huddy* only; and, after the evidence for the Crown was closed, he stated that *Huddy* wished to make his statement of the facts to the jury, and that, afterwards, he should have a right to comment to the jury, as well on the statement made by *Huddy* as on the facts proved; and he stated that this had been allowed by *Alderson B.* on the Northern Circuit, in a case not yet reported (a), and that on this circuit Lord *Denman C. J.* had allowed it to be done. Before the alteration introduced by the Act which

(a) The reporters are not aware of the case alluded to: but it would seem that the learned Baron did allow this course to be taken in a trial on the Oxford Circuit. (See *Regina v. Malings*, 8 Carr. & P. 242.) This was, however, under peculiar circumstances; the general practice seems in accordance with the rule laid down by Mr. *J. Bosanquet* in the principal case. (See *R. v. Boucher*, 8 Carr. & P. 141.—*R. v. Walkling*. *Ib.* 243.)

gave to prisoners the benefit of full defence by counsel, a prisoner was allowed to make his own statement of the facts ; and, unless he were allowed to do so still, he would be put in a worse situation by being allowed a defence by counsel, whom his lordship would, probably, consider to be bound not to state facts of which he had no proof, and not to be allowed to make a statement of facts, merely as that given by the prisoner. In fact, *Coleridge J.* had so decided in *Rex v. Beard*. (a) He added that such an interpretation had been given to the statute allowing a defence by counsel, in cases of treason.

1838.

 The QUEEN
 v.
 BURROWS
 And Others.

BOSANQUET J. Undoubtedly I should feel much impressed by the authority of those learned judges, but as I am not informed of the circumstances of the cases decided, I must act on my own opinion ; and I think that the recent statute, giving to prisoners the benefit of defence by counsel, could only be meant to put them in the same situation, in cases to which it applies, (b) as they were in before, when defended by counsel, in questions of misdemeanors ; and in those cases, certainly, a defendant could not be allowed the privilege of two statements, one by himself, and another by counsel. The case of treason has always been considered an exception, and has been defended on the ground that the statute, giving counsel in cases of treason, uses the term “a full defence,” as the privilege to be given parties charged. I think two speeches cannot be allowed.

(a) 8 Carr. & P. 142.

(b) The statute applies to felonies only : the principal case was one of misdemeanor.

1838.

Rowe accordingly addressed the jury for *Huddy*, and the other prisoners made their own statement.

Verdict Guilty.

Moody and *Kekewich* for the prosecution.

Rowe for *Huddy*.

LAUNCESTON.

Coram BOSANQUET J.

LAUNCESTON,
March 26.

LEAN v. SMYTH.

Where the plaintiff at the assizes is compelled to withdraw his record on account of the non-arrival of his witnesses, on his cause being called on, a judge will allow the record to be re-entered on the arrival of the witnesses, unless it be shown by affidavit for the defendant that his witnesses have been dismissed.

THIS cause was entered third in the list; and on being reached at one o'clock in its turn, the business having commenced at nine o'clock,

Bompas Serjt. for the plaintiff applied that the next cause should be taken, as his witnesses were expected by coach immediately, but the coach had not yet arrived.

Erle for the defendant opposed this application, and insisted on the rule that the causes be taken in their turn.

BOSANQUET J. said that the plaintiff must either proceed, or withdraw his record.

The record was accordingly withdrawn.

At three o'clock, during the trial of the next cause in order, *Bompas* Serjt. stated his witnesses

for leave to re-enter his
as ready to withdraw
that the defendant

1838.
LEAN
v.
SMYTH.

declined to
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ent away some wit-
ause to be re-entered.

ic, the cause was re-en-

the plaintiff.
endant.

WEARY v. ALDERSON.

LAUNCESTON,
March 26.

ASSUMPSIT for goods sold and delivered.

Pleas, *Non assumpsit*, except as to 16*l.* 6*s.* 10*d.*,
and as to that sum, payment before action brought
in full satisfaction, &c.

The replication traversed the payment and re-
ceipt in satisfaction.

Bompas Serjt., in support of the plea of pay-
ment, put in a writ of summons, issued by the
present plaintiff, against the present defendant and
a person of the name of *Sweetland*.

A receipt,
given by the
agent indorsed
on the back of
a writ as issu-
ing it, for the
sum claimed,
is admissible
to prove pay-
ment of that
sum, between
the same
parties, with-
out calling the
agent.

1837.

WEARY
v.
ALDERSON.

The writ was indorsed in the usual way, claiming for debt 16*l.* 6*s.* 10*d.* and for costs 3*l.*, and also thus, "This writ was issued by *Richard Williams*, "agent for *Christopher Wallis*, of *Bodmin*, Corn-
"wall, attorney for the said plaintiff *Weary*."

Bompas Serjt. also produced a stamped receipt, signed by Mr. *Williams*, the *London* agent, for the debt and costs indorsed on the writ of summons.

Erle objected to the admissibility of this receipt to prove the payment. It was a mere declaration made by *Williams*, and was no more admissible than a letter or other written statement of a fact. *Williams* ought to be called to prove the fact on oath, subject to cross-examination.

BOSANQUET J. said he was of opinion the receipt was admissible : it was given by the agent, whose name was indorsed on the writ, under the new rules ; and since those rules, such agent must be considered a party authorized to receive the debt and costs.

Verdict for the plaintiff.

Erle and *Butt* for the plaintiff.

Bompas Serjt. and *Crowder* for the defendant.

EXETER.
Coram TINDAL C. J.

Collyer v. Bennett
21.2.9.29.75.

1837.

EXETER,
July 29.

BASTARD v. SMITH and Others. (a)

THIS was an action of trespass, the trial of which occupied two days.

The declaration was for breaking and entering certain closes of the plaintiff, some of them in the parish of *Buckland-in-the-Moor*, and others in the parish of *Ashburton*, in the county of *Devon*, and digging a trench through the lawn, garden, woods, and plantations of the plaintiff, and felling trees and wood thereon.

The defendants pleaded, that within and throughout the county of *Devon* there now is, and at the said several times when etc., was, and from time whereof the memory of man runneth not to the contrary there had been a certain ancient and laudable custom there used and approved of, viz., that every stanner, or working tinner, working any stannary or tin mine in the stannaries in the said county, hath and have had and have and hath been accustomed to have without interruption, and of right ought to have had, and still ought to have free liberty to divert and convey water from any watercourse, or stream of water in the said county, unto and into any stannary or tin mine, in the stannaries in the said county, whilst being worked

Where the substantial question to be tried is the existence of a custom, affirmed by the defendant, he is entitled to begin, although the plaintiff's counsel alleges that he seeks to recover real damages.

The stanners of *Devonshire* are not entitled by custom to divert water from streams into their mines, and for that purpose to dig trenches over other people's lands.

My field of Buckland
21.2.9.29.75.

(a) This case ought to have been inserted amongst the cases of the Summer Circuit, 1837, but was accidentally omitted in that part of the volume.

1837.
BASTARD
v.
SMITH
and OTHERS.

by such stanner or working tinner, and unto and into the works of the same, so often as, and so long as the said stannary or tin mine, or the works thereof were being worked, and where, when, and so often as need, or occasion should be or require the same, and in such quantities as were or may be convenient and necessary for the better, or more convenient operations and working of such stannary or tin mine, and the works thereof, and for the washing and cleansing of the tin, being in and coming and arising therefrom, and to dig, cut, sink, and make, and keep, continue, and maintain in, upon, and through any land or lands, situate in the said county, such trench or trenches as from time to time were convenient and necessary for the diverting and conveying of the said water from such watercourse, or stream of water as aforesaid, in and along such trenches unto and into such stannary or tin mine whilst being so worked, and unto and into the works thereof, so often and so long as the said stannary or tin mine, or the works thereof were being worked, when, where, and so often as need or occasion should be, or require the same, for the better and more conveniently operating and working of such stannary or tin mine, or the works thereof; and for washing and cleansing of the tin being in, and coming, and arising therefrom, and to do all such works or things in and upon the land or lands, in, upon, and through which such trench or trenches were to be, or were so dug, sunk, or made for the purposes aforesaid, as were or might be necessary for the digging, cutting, sinking, or making of such trench, and keeping, and continuing, and maintaining the same for the purposes afore-

said. The plea then stated that certain of the defendants were stanners and adventurers and occupiers of two tin mines, called the *Union* and *Owlacombe Mines*, in the parish of *Ashburton*, in the stannaries, in the county aforesaid; and which mines had been worked from time immemorial: and that the other defendants were working tanners, and working in the said mines: and that it became convenient and necessary for the working of the said mine and cleansing of the said tin, that the stream called *East Webbe*, should be conveyed to the said mines, and a trench dug for the purpose in the closes in which, &c., and that they entered the closes, &c., for that purpose, and dug the trench mentioned in the declaration, &c., doing no unnecessary damage. (a)

The plaintiff replied *de injuriâ*, &c.

Sir *William Follett*, on the part of the plaintiff, claimed the right to begin. He stated that this was a claim for substantial damages, and that it would be essentially necessary for the plaintiff to call witnesses, that the jury might know the extent of the injury sustained. He cited a recent case tried before Lord *Denman* (b), where the action being brought on a policy of insurance against fire, his lordship ruled, that although the affirmative of the issues lay on the defendant, still the plaintiff

(a) The defendant originally pleaded another plea, in which the custom was qualified, by alleging a similar right upon making compensation for the injury done. The Court of Queen's Bench, however, on the motion of the plaintiff, ordered one of the pleas to be struck out. (5 Adolph. & Ellis, 827.)

(b) *Absalom v. Beaumont*, vol. i. 441. n.

1837.


BASTARD
 v.
SMITH
 and **OTHERS.**

had the right to begin, because he had to prove the amount of loss ; distinguishing the case from that of an action on a life insurance, where the sum was ascertained.

Erle and *Crowder*, for the defendants, contended that this was the ordinary case of a custom alleged by the defendant, and denied by the plaintiff, and which it was incumbent on the defendant to prove. They referred to the general rule laid down by the Judges in *Carter v. Jones*, (a) and contended that the present case did not fall within the class of excepted cases there provided for, in which the plaintiff was allowed to begin, notwithstanding the form of the issue. It is not the mere declaration of counsel that the plaintiff's object is to recover heavy damages, that ought to govern the discretionary power of the judge ; but he should look at the nature of the case : here, it cannot be doubted that the main object of the parties is to try the right. Indeed, this action is brought at the suggestion of the Lord Chancellor, for the purpose of ascertaining the existence of the custom, in consequence of certain proceedings between the parties in the Equity Court.

TINDAL C. J. This record might have been drawn so as to give the plaintiff the right to begin ; he might have traversed the custom, and also new assigned any excess of which he complains ; he would then have had the right to begin : but as the record now stands, the defendant relies on a

(a) Vol. i. 281.

custom, and also upon certain facts stated in his plea to bring the case within the alleged custom ; the affirmative, in both respects, is upon him. As to the damages, no special damage is averred in the declaration, beyond that necessarily arising from the simple act of trespass complained of, viz., digging a trench of a certain length and depth ; and, indeed, it appears from what is alleged as to the Equity proceedings, (and which is not denied by the other side,) that substantial damages are not in the contemplation of these parties. I think it falls within the general rule, that as the affirmative lies on the defendant, he has the right to begin.

1837.

 BASTARD
 v.
 SMITH
 and OTHERS.

The defendants accordingly began.

Evidence was given on the part of the defendants, shewing by extracts from *Domesday Book*, that *Ashburton* was at that time the demesne of the Crown, and that *Buckland* was at that time the demesne of the Bishop of *Constance*. Several ancient charters were put in, and amongst them one of King *John* (*Anno. reg. 3.*) by which that king granted to the tanners in *Cornwall* and *Devonshire* power to dig tin and turf for the smelting of tin every where in the *Moors*, and in the fees of Bishops, Abbots, and Earls, as they had been used and accustomed, and that they might procure fire wood for the smelting the tin without waste in the regards of forests, and to divert waters for their works in the stannaries as by ancient custom they had been wont. It was also shewn, that in the 33d year of *Edward 1st.*, the tanners of *Cornwall* and *Devonshire*, wishing apparently to secure their customs

1837:

 BAYTARD
 v.
 SMITH
 and OTHERS.

by separate charters, two new charters were then granted, one for the tanners of *Cornwall*, the other for those of *Devonshire*. These charters differed from each other in no respect, save that in the charter of the tanners of *Cornwall*, certain places were appointed for the smelting places, or stamping places for that county; whilst in the charter to the *Devonshire* tanners, other places in that county were fixed for the same purpose, so far as respected the *Devonshire* tanners. In all other respects the two charters were precisely to the same purport, granting that the tanners should be quit of all tallage, &c., in towns, markets, &c.; "and that they may dig tin and turf, for the smelting of tin, everywhere in the lands, the moors, and the wastes of us and of other persons whomsoever in the county aforesaid, and may divert where and as often as need shall be, the waters and watercourses for the works of the stannaries aforesaid, and may procure fire-wood for smelting the tin as was anciently accustomed to be done without hindrance of us, or our heirs." It appeared, however, in evidence, that the custom of the stannaries in *Cornwall* was not in conformity with that set up by the plea in this action, from which circumstance it was strongly pressed upon the jury, that the practice had grown up in *Devonshire*, by usurpation subsequent to 33 *Edw.* I.

There was also evidence of the proceedings in a cause of *Hull v. Mitchel* and *others*, 12 *Rich* 2., wherein the defendants having justified entering and digging in the lands of the plaintiff, under the charter of 33d of *Edw.* I., the plaintiff replied that, before the charter, the tanners did not

dig tin except in the lands of the King, without the leave of him whose soil it was. The defendant, however, died, and it did not appear that any further proceedings were taken in the cause.

1837.
BASTARD
v.
SMITH
and OTHERS.

There was evidence of acts done in pursuance of the custom, and of reputation on the subject.

On the part of the plaintiff, it was contended that the claim set up by the plea was unreasonable in itself, and such as could not be tolerated in a court of law, even if there were satisfactory evidence of its having been claimed on the one side, and acquiesced in on the other, for a long period of years ; and 2dly, that the evidence did not establish the custom in point of fact.

TINDAL, C. J. in summing up to the jury, after commenting upon the evidence, said, As to the argument addressed to you, touching the unreasonableness of the custom ; although you are not called on to say whether this be a reasonable custom or not, (for that is a matter of law, not submitted by the present pleadings to your decision,) still you may properly thus far look to the nature of the custom, that, if you find it greatly affecting the rights of private property, you may fairly expect and require that it should be supported by evidence proportionably strong and convincing. You are not to come to the conclusion that the inhabitants of a large district, like that over which the supposed custom extends, surrendered their rights over their own soil, unless you find repeated acts of exercise of the custom on the one hand, and of acquiescence

1897.
BASTARD
v.
SMITH
and OTHERS.

on the other. It is only by such acquiescence that the present claim can have acquired validity; for on the evidence, it is clear that the lands over which it is supposed to extend, did not at the period of *Domesday Book* all belong to the Crown: the mere charter of the king, therefore, (supposing it could bear the interpretation put upon it by the defendant,) cannot have given a legal origin to the claim. Then, as to the proof of the custom, you cannot, indeed, reasonably expect to have it proved before you, that such a custom did in fact exist before time of legal memory, that is, before the first year of the reign of *Richard I.*; for if you did, it would in effect destroy the validity of almost all customs: but you are to require proof, as far back as living memory goes, of a continuous, peaceable, and uninterrupted user of the custom; and then you should inquire whether any document, or memorial, of more ancient times, is produced, tending to *disprove* the existence of the custom at that early period to which the law looks back.—If you think the custom is proved, either in the terms in which it is pleaded, or subject only to certain exceptions or qualifications, you will find your verdict for the defendants, telling me what those exceptions or qualifications are: if you think the custom is not proved at all, your verdict must be for the plaintiff.

Verdict for the plaintiff.

Sir *W. Follett*, *Barglow*, *Bere*, and *M. Smith* for the plaintiff.

Erle, *Crowder*, and *C. Rowe* for the defendants.

C A S E S
 ARGUED AND DECIDED
 AT NISI PRIUS
 IN THE COURTS OF
 QUEEN'S BENCH, COMMON PLEAS, AND
 EXCHEQUER,
 AND ON THE
 NORTHERN AND WESTERN CIRCUITS.

SUMMER ASSIZES, 2 VICTORIA.

YORK.

Coram ALDERSON B.

1838.

REGINA *v.* THE INHABITANTS OF
 PRESTON.

YORK,
 July 10.

*Regina - Chalkinbe.
 2. Mo. 311. n.*

THIS was an indictment against the inhabitants of *Preston*, in the county of *York*, for the non-repair of a public highway. The indictment had been preferred, by direction of the justices at sessions, under the statute 5 & 6 *W. 4. c. 50. s. 95.*, and the defendants had removed it into the court of Queen's Bench by *certiorari*.

The Judge on the trial of an indictment for the non-repair of a pair of *ad. Jura. 1037.* highway *21. d. J.* found at sessions under 5 & 6 *W. 4. c. 50. s. 95.*, has no power to award costs for a frivolous defence, under the 98th section. The power is limited to the court at which the indictment was preferred.

The defendants having been found guilty, *Cresswell*, for the prosecution, applied for an order on the defendants to pay the costs of the prosecution under the 98th section of the act.

1838.

 REGINA
 v.
 The Inhabit-
 ants of
 PRESTON.

ALDERSON B. expressed himself to be clearly of opinion, that the defence was "frivolous" within the meaning of the section cited, and a case in which, if the legislature had given him authority to do so, he should make an order on the defendants to pay the costs; but as the discretion over the costs was in terms given to the court at which the indictment *was preferred*, and not to the court before which it *was tried*, he entertained much doubt whether he could make any order.

11th July.

His Lordship on the following morning said he had examined the different provisions of the Act of Parliament, and was of opinion that he had not any authority over the costs.

The motion was accordingly

Refused.

Cresswell and Hildyard for the prosecution.

Wightman for the defendants.

YORK,
 July 11.

EVERINGHAM v. ROUNDELL.

The contents of a document refused to be produced after notice, cannot be proved by the production of a copy of a copy of the document. The first copy ought to be produced.

THIS was an action against the Sheriff for extortion.

A notice had been served on the Defendant to produce the writ of execution; the defendant refusing to produce it, a witness was called to give secondary evidence of its contents: for that purpose he produced a paper writing, purporting to be the copy of a writ; but on cross examination it

turned out that he had not examined the paper writing now produced, with the writ itself, but only with a copy which he had before examined with that writ, and which examined copy he had left at home.

1838.

 EVERINGHAM
 v.
 ROUNDELL.

Watson objected that this was not admissible as secondary evidence of the contents of the writ.

Alexander, contra. The defendant refusing to produce the best evidence, the plaintiff is entitled to give the best secondary evidence that he can; if it be made out that this paper writing is substantially a copy of the writ, the plaintiff is entitled to make use of it, though it has not been examined with the original.

ALDERSON B. There would be no limit to the reception of secondary evidence, if that were so. The non-production by a party of the best evidence does not open the door to all sorts of other evidence, however loose, which his adversary chooses to tender. This is but the shadow of a shade: the examined copy ought to be produced.

The secondary evidence was rejected.

Nonsuit. (a)

Alexander and Tomlinson for the plaintiff.

W. H. Watson for the defendant.

(a) See accord. *Liebman v. Pooley*, (1 Stark. R. 167.) — p. Lord *Ellenborough* C. J., and the rule laid down by Lord *Hardwicke*, C., in *Villiers v. Villiers* (2 Atk. 71.), as to the

1838.

YORK,
July 17.

MAYOR, &c. of BEVERLEY v. CRAVEN.

DEBT for Tolls.


When an ancient document, purporting to be an exemplification, is produced from the proper place of deposit, but has not, at the time of its production, the Great Seal affixed, it is still to be presumed that it is an exemplification, and may be read in evidence as such.

In order to show that a part of the river *Hull*, at which a vessel of the defendant had landed, was within certain limits, within which the corporation had a right to take toll, the plaintiffs tendered in evidence a parchment, purporting to be an exemplification of a commission, issued by the crown in the reign of Queen *Elizabeth*, to certain persons therein named, directing them to enquire into the boundaries of the borough of *Beverley*, and of the proceedings taken in pursuance of that commission: there was a slip of parchment at the foot, corresponding in size and form with those on which the Great Seal is usually affixed; but the seal was in this instance wanting: and whether there ever had been one affixed, it was impossible, from the present appearance of the parchment, to say. It was shown that the document came from the corporation chest.

For the defendant it was objected, that the seal being wanting, the document tendered could not be treated as an exemplification, but only as a copy; and, therefore, could only be received after the usual evidence of its accuracy as a copy.

admissibility of secondary evidence. On the other hand, if the witness can speak from *memory*, it seems clear he need not produce the document (whether copy or original), by which his memory is refreshed. (*Kensington v. Inglis*, 8 East. 273. 289.)

No proof was given that a search had been made after the supposed original.

1838.

 Mayor of
 BEVERLEY
 v.
 CRAVEN.

ALDERSON, B. The document purports, by its contents, and on the face of it, to be an exemplification ; and as it comes from the proper place of deposit for instruments of that kind, I think it must be presumed that it was a complete exemplification, and that the seal has been accidentally removed.

The document was accordingly read for the plaintiffs.

Verdict for defendant.

Alexander, Dundas, and Hildyard for the plaintiffs.

Cresswell and Tomlinson for the defendant.

YORK.

Coram WILLIAMS J.

REGINA on the Prosecution of A. NEWTON,
 Esq. v. HARLAND and Others.

YORK,
 July 18.

THE Grand Jury having found a true bill against the defendants for a forcible entry upon certain apartments at *Ripon*, in the occupation of *Augustus Newton, Warren* obtained a rule calling on the defendants to show cause why a writ of restitution should not be awarded, commanding the sheriff to
 is found is not bound to award a writ of restitution upon the finding. discretion whether to grant it or not.

Where the Grand Jury at the Assizes find a true bill for a forcible entry under the st. 8 H. 6. c. 9. the Judge before whom the indictment He has a dis-

1838.
 REGINA
 on the Prosecution of
 NEWTON
 v.
 HARLAND
 and OTHERS.

restore the possession of the apartments to the said *A. Newton*, on affidavits which stated that, whilst he was lawfully in possession, viz. in *March*, 1837, the defendant *Harland*, accompanied by six other men named in the indictment, forcibly entered on the premises and ejected the prosecutor; and that, on the 4th *July*, 1838, he required them to restore possession to him, which was refused.

Tomlinson now showed cause, and produced an affidavit of *Harland* that he demised the rooms (part of his dwelling-house) to the prosecutor for six months, ending on the 25th *March*, 1837; that no fresh agreement was made, nor any continuance of the tenancy; and that the prosecutor nevertheless refusing to quit the rooms at the expiration of the six months, *Harland* and the other defendants thereupon entered and ejected him; and he denied that any force had been used by him. On these affidavits, *Tomlinson* contended that the prosecutor was not entitled to the rule. He said there were two modes of proceeding open to a party who complains of a forcible entry: he may either prefer an indictment at common law, in which case the wrong-doer is punished, but no restitution awarded; or he may proceed under the statute of 8 H. 6. c. 9., in which case it is competent to the court to award restitution; and that statute warrants two forms of proceeding—one before justices of the peace; the other by indictment at the assizes. In regard to proceedings before the justices of the peace, it is unnecessary to enquire whether they are compellable to award restitution in cases before them, because the prosecutor has


elected the other course of proceeding, viz. by indictment in the superior court. It may be, that justices of the peace, being considered less competent to adjudicate on the right in such cases, are bound at once to restore the possession to the party forcibly removed from it. But where a party chooses to proceed before justices of assize, the authorities show that there is a discretion to be exercised; and the court will not, except under very peculiar circumstances, exercise that discretion by awarding restitution, on a mere *ex parte* finding of the forcible entry. (*Com. Dig.* Forcible Entry, D. 7. *Burn's Justice* (by *Chitty*), Forcible Entry p. 899.) It does not even appear that, in the present case, the prosecutor's title is a continuing one at the time he applies for restitution, which itself is a sufficient answer to the application. In *Rex v. Hoare* (a), there was an allegation of *seisin* at the time of the forcible entry, and the law will imply the continuance of a *seisin*; but not so when the party relies on the mere fact of possession. In *Rex v. Hake* (b), the defendant confessed that he had no title; and the reporters (one of whom was engaged as counsel in the cause) explain the true principle of that decision in a note. He also cited *Rex v. Wilson*. (c) If, then, an application of this kind, when made to a superior court, is entirely a matter of discretion for the judge, there are circumstances in the present case quite sufficient to induce the court to refuse the rule:—1st, The great length of time that had been suffered to

1838.
 REGINA
 on the Prosecution of
 NEWTON
 v.
 HARLAND
 and OTHERS.

(a) 6 Maule & S. 266.

(b) 4 Mann. & Ryl. 483. in notā.

(c) 8 Term. R. 357.

1838.

 REGINA
 on the Prosec-
 ution of
 NEWTON
 v.
 HARLAND
 and OTHERS.


intervene between the ouster and this application ;
 2dly, That it did not appear that the prosecutor
 had any continuing interest in the premises ; 3dly,
 Because (for aught that appeared) the grand jury
 may have proceeded entirely on the uncorrobo-
 rated *ex parte* evidence of the prosecutor himself.

Warren, contra. *Harland* denies merely that
 he *personally* used force ; but if several come in
 company where their entry is not lawful, and all
 of them, saving one, enter in a peaceable manner,
 and *that one* only use force, it is a forcible entry in
 them all. (Dalton's Just. 303. ; Fitzh. Abr., title
 Coron. §14.) Here, therefore, is a forcible entry
 alleged by the applicant for this writ, and not
 denied. If this be so, then the justices have no
 discretion, but are bound to award restitution ; for
 the words of the statute are, that on its being
 "found before any of the justices that any doth
 "contrary to this statute," *i. e.* enter with force,
 "then the said justices shall *cause to re-seise* the
 "lands and tenements so entered or holden as
 "aforesaid, and shall put the party so put out in
 "full possession of the same lands and tenements."
 (8 *Hen.* 6. c. 9. s. 3.) There is nothing said here
 of any proof being first required of title on the part
 of the claimant of restitution. The restitution is
 to be then awarded by the same justices before
 whom the indictment was found. (8 *Hen.* 6. c. 9. ;
 and Bacon's Abr., tit. Forcible Entry, F.) The
 case of *Rex v. Hake* is decisive to show that the
 finding of the grand jury is a "finding" within
 the Act ; and there the writ was awarded in the
 first instance, without granting the defendants an

opportunity of showing cause against it. It is not the title, but the possession, which is in question. (Chitty's Burn's Justice, tit. Forcible Entry, 899.) At common law, a statement of *possession* sufficed (*Rex v. Wilson (a)*); and when the statutes of 15 R. 2. c. 2. and 8 Hen. 6. c. 9., were, by statute 21 Jac. 1. c. 15., extended to cases of tenants for terms of years and others, the principles requiring a strict allegation of title, and of a continuing freehold interest, became inapplicable. Here it is stated that the applicant was lawfully possessed; it will be presumed as against the defendants that he was possessed for a term of years, and that such possessory interest continued; and one of the counts in the indictment in *Rex v. Hake* stated merely a peaceable possession, and no observation was made upon that circumstance. If this indictment had been removed by *certiorari* into the King's Bench, the court might, perhaps, have a discretion (Bac. Abr., tit. Forcible Ent., F.), but none can be exercised by the justices before whom the force is *found*, as it has been here found; and, consequently, it is unnecessary to consider how far the circumstances stated in the affidavits might influence the exercise of that discretion.

Cur. adv. vult.

WILLIAMS J. I have looked into some of the authorities that were cited yesterday, and think that I have a discretion in this case, as to whether I will or will not issue my warrant for restitution.

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I should require a very express authority to induce me to do so on the mere finding of the grand jury, which is plainly only an *ex parte* statement, the defendants having had no opportunity of being heard or contradicting it; but I find none of the cases furnish any such authority. Then is this a case where, in the exercise of my discretion, I ought to award restitution? I think not. In the case of *Rex v. Hake*, the affidavit clearly disclosed a subsisting interest and title in the prosecutor, which is flatly denied in the present instance. If I am wrong, the prosecutor can get the court of Queen's Bench to set me right, when *they* may exercise the discretion which, according to *Rex v. Marrow (a)*, they are clearly possessed of.

Motion refused. (b)

Warren for the prosecutor.

Tomlinson for the defendants.

(a) Reports, Temp. Hardwicke, 174.

(b) *Newton*, in the following term, applied to the court of Queen's Bench for a writ of restitution, urging very much the same arguments as had been insisted upon by *Warren*. The court, however, were of opinion, that the learned Judge at the assizes had a discretion as to granting or refusing restitution; and as he had exercised that discretion, the court refused to interfere.

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LIVERPOOL SUMMER ASSIZES.
Coram ALDERSON B.

LIVERPOOL,
August 16.

REGINA v. BOARDMAN. *Regina v. Boardman. 10. Nov. 1834.*

THE indictment charged the prisoner with feloniously forging a certain receipt for the payment of money, in form following (that is to say) : —

An indictment for forging a receipt in the following form : —

“ 6th January, 1830.

“ 6th January, 1830.

“ £16: 15: 6.

“ £16: 15: 6.

“ For the High Constable,

“ For the High Constable,

“ James Hughes.”

“ James Hughes.”

does not require explanatory averments.

with intent to defraud one *Edmund Grundy*. There was also a count charging that the prisoner feloniously *uttered* the receipt, knowing it to be forged, with intent to defraud the same party. There were various other counts in which the intent was differently laid ; and one set of counts alleged that the prisoner intended to defraud the inhabitants of the township of *Rivington*.

It appeared in evidence that the prisoner, in the year 1830, and for many successive years, down to 1837, had been assistant overseer for the township of *Rivington* ; that in the course of his duty as such assistant overseer, he was in the habit of receiving warrants from Mr. *Grundy* (the high constable of the hundred in which *Rivington* is

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situate), ordering him to levy on the inhabitants of that township their quota of the county rate; and that he then paid the amount which he had so levied to the high constable's credit at a banking-house in *Manchester*.

In the year 1830, having levied to the amount of 11*l.* 5*s.* 6*d.*, he paid that sum, as usual, into the banking-house to the credit of the high constable; and the clerk of the bankers (*James Hughes*) gave him a receipt for the 11*l.* 5*s.* 6*d.* in the following terms: —

“ 6th January, 1830.

“ £11 : 5 : 6.

“ For the High Constable,

“ *James Hughes.*”

In the year 1838, the prisoner was removed from the office of assistant overseer, and a successor appointed; and upon that occasion, being required to hand over to such successor the papers and books in his custody belonging to the parish, the prisoner delivered to him a great bundle of papers, amongst which the parish officers afterwards found the receipt in question; but the figures had been altered from 11*l.* 5*s.* 6*d.* into 16*l.* 15*s.* 6*d.* The prisoner's accounts had been passed and allowed in the usual way from time to time; and it did not appear that at the time he handed over the papers to his successor in office, any dispute had arisen as to the correctness of his accounts, or that any intention was suggested of auditing them.

It was admitted that the only count which the evidence supported was that which charged the

prisoner with uttering the receipt with intent to defraud *Edmund Grundy*; and, in respect of that count, it was contended that it was not good in point of law. The document set out in the count was not, on the face of it, necessarily a "receipt for the payment of money." The words were, in themselves, quite ambiguous, and might as well be construed to import that *James Hughes* had *paid* money for the high constable, as that he had *received* it for him: neither was it to be deemed a "receipt," within the terms of the statute, because the prosecutor had expressly called it by that name in his indictment. He should have gone further, and explained, by reference to the other documents, or to the course of business, how the instrument, in itself ambiguous, came to have the effect of a receipt. (*Hunter's case (a)*; *Thompson's case (b)*; and *Barton's case (c)*). But, even if the count be good on the face of it, there was here no felonious utterance of the instrument by the prisoner. It was not delivered over by him with any intention that it should be used as a voucher, but merely as one amongst a great number of parish papers which he was called upon to hand over to his successor. His own accounts had been settled; and the time for re-auditing them, had that been intended, was passed. There was no evidence whatever to show that the prisoner intended to defraud the high constable, or that the utterance of the instrument, in its altered form, would have that effect.

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(a) 2 East. P. C. 928.
(c) 1 Moo. C. C. 141.

(b) 2 Leach, 910.

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ALDERSON B. The cases cited are clearly distinguishable from the present. In *Hunter's* case, the forgery consisted in merely counterfeiting the *signature* of the party, which, of course, meant nothing without reference to other documents. In *Thompson's* case, the forgery consisted in writing the word "settled" on an account; that, also, was an expression in itself entirely ambiguous: it might mean either that the party was satisfied as to the correctness of the items, or that he had received the amount. But, indeed, that case has been expressly overruled by *Rex v. Martin (a)*. I think there is nothing in the first objection. As to the main point — the felonious utterance, — I am of opinion, that if the prisoner handed the receipt over to his successor as one of his vouchers, knowing that the figures had been fraudulently altered, he was thereby guilty of a felonious uttering, and that the intention is correctly described to be that of defrauding *Edmund Grundy*, the high constable; for what is the necessary effect of so handing over the altered receipt? The parish would discover from that receipt that the high constable had been paid 16*l.* 15*s.* 6*d.* instead of 11*l.* 5*s.* 6*d.* (to which latter sum only he was entitled); and the effect would be, that the high constable becomes liable to refund to the parish the sum which the receipt shows that he received in excess. That being the necessary consequence of the prisoner's act, it must be presumed that he intended it, and no proof of such actual intention is necessary. That has been ruled by all the judges, in a case reserved

(a) 1 Moo. C. C. 483.

by my brother *Patteson*, in consequence of a supposed opinion of Lord *Abinger* to a different effect. The lapse of time can make no substantial difference. Supposing a party forges a receipt for the payment of a debt of more than six years' standing, it is true the debtor might be already protected by the statute of limitations, but still the forged receipt would alter the position in which the creditor would stand, and it would clearly be a felonious forgery.

His Lordship laid the law down to the jury in conformity with the above observations, and they found the prisoner

Guilty.

Brandt and *Cross* for the prosecution.

Dr. Brown and *L. Peel* for the prisoner.

WINCHESTER.
Coram PARKE B.

WINCHESTER,
July 13.

DAY v. PORTER and Others.

TRESPASS, for breaking and entering a dwelling house, and pulling down a wall.

Plea, not Guilty.

The trespass having been proved against the defendants, *Crowder*, for the defendants, in his address to the jury, proposed to prove, that the plaintiff had already brought an action against the landlord (under whose orders the defendants acted,

In trespass, a recovery of damages against a co-trespasser not sued is not admissible in mitigation of damages under the plea of not guilty.

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and who was not joined in the present action), and recovered damages for the same trespass.

Bompas Serjt. objected, that the evidence was inadmissible, inasmuch as the matter proposed was a bar to the action, and ought to have been pleaded as such (*a*).

Crowder, contra. At all events it is evidence in mitigation of damages ; *Knight v. Legh* (*b*), *Morris v. Robinson* (*c*). The case may be likened to a case of payment not pleaded.

PARKE, B. That is an exception, and depends on peculiar circumstances. In trespass the rule is general, that what may be pleaded to the whole or any part of the action cannot be given in evidence under the general issue. A recovery against one so trespassing is a satisfaction against all for the same trespass.

The evidence was rejected.

Verdict for plaintiff, 1*s*.

Bompas Serjt. and *Butt* for the plaintiff.

Crowder and *Rawlinson* for the defendants.

(*a*) See Roscoe on Evidence, 488.

(*b*) 4 Bing. 589.

(*c*) 3 B. & C. 196.

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HOLDSWORTH v. THE MAYOR, &c. of EXETER,
DARTMOUTH. July 26.

*Written Benth -
2 Nov. 1837.*

DEBT on bond for 1249*l.*, dated 16 May, 1833.

Pleas, 1st, A general plea of fraud and covin. 2d, That the bond was fraudulently obtained for the repayment of a sum advanced by the plaintiff, for the defence of certain writs of *quo warranto*, which defence was not authorised by the corporation. 3d, A certain bye-law prescribing a certain mode of deciding on all questions relating to the property of the corporation; and that the bond was not given according to the bye-law.

Where a witness gives on cross-examination unfavourable testimony to the party calling him, and on re-examination denies having given a different account of the matter so spoken to, the party calling him has no right to discredit him by showing he had given such different account.

The contest in the cause was, whether the present corporation were bound by the act of the then corporation, in giving the bond in question before the passing of the municipal reform act: and in order to prove the pleas, *Crowder*, for the defendants who began, was obliged to call members of the old corporation, who took part in giving the bond. The plaintiff was an influential member of the then corporation. One of these witnesses said, in his cross-examination, that the transaction of giving the bond was, as far as he knew, an honest and correct transaction. *Crowder*, on re-examination, was allowed to ask the witness, whether he had not told the defendant's attorney, that it was a shameful transaction, which he denied, whereupon *Crowder* proposed to call the attorney and ask him, whether the witness had so said.

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This was objected to by *Erle*, for the plaintiff. The defendants knew the situation of the witness, and cannot be allowed to discredit him. If they had not thought him worthy of credit, they ought not to have called him.

Crowder. The course of the cross-examination was not to break down the witness, but to make him the witness for the plaintiff, by the facts asked to on the plaintiff's side. He cited *Dunn v. Aslett*, 2 Moo. and Rob. 122, as confirming Lord *Denman's* opinion in *Wright v. Beckett*, 1 Moo. and Rob. 414.

PARKE, B. Upon consideration, I think the evidence inadmissible. My doubt, at first, was, whether, as the fact was elicited in cross-examination, the witness was not made for this purpose the witness of the plaintiff; and whether, as to this particular fact, not asked to in chief, the party calling him might not show he had given a different account. I never had any doubt, but that the opinion of my brother *Bolland* was right in the case cited, if the fact were asked to in the examination in chief; as by calling the witness you take him for better and for worse, and must not throw discredit on him. I am now satisfied that it makes no difference that the fact is elicited on cross-examination. The effect and object of the evidence is to discredit the witness. It goes to his general credit to show that he has given a different account of the matter before; and it is a clear rule, that a party has no right to put a witness into the box as a witness of credit,

and when he gives unfavourable evidence, to call testimony to discredit him.

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DARMOUTH.

Verdict for the defendants on the 2d plea, subject to a special case: for the plaintiff, on the other pleas.

Erle, Barstow, and Holdsworth for the plaintiff.
Crowder and Butt for the defendant.

WELLS SUMMER ASSIZES.
Coram PARKE B.

REGINA v. HAYES, WALTER, and Others. WELLS.

FOUR prisoners were indicted jointly, *Hayes* and *Walter* for stealing a sheep, and the two others separately in distinct counts for receiving separate parts of the mutton of the sheep so stolen and killed. *Jardine*, counsel for the two receivers, put in the depositions to contradict the case against the receivers, by showing a variation between the testimony of the principal witness and the depositions.

Edwards, for the prisoner *Walter*, called no witnesses.

Moody, for the prosecution, proposed to reply on the whole case against all the prisoners.

PARKE B., after conferring with *Coltman J.*,

Semble. If two prisoners are indicted jointly for the same offence, and one call witnesses, the counsel for the prosecution is entitled to a general reply. But if the offences are separate, and they might have been separately indicted, he must in his reply confine himself to the case of the party who has called witnesses.

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stated, that the reply must be confined altogether to the case of the receivers; that he did not wish to lay down a general rule, that in no case where several were indicted together, would witnesses called by one, entitle the prosecutor to reply against all; but in this case the offences were distinct, as the receivers might have been indicted separately from the principal.

All the prisoners were found guilty.

Where two receivers are charged in the same indictment with separate and distinct acts of receiving, it is too late after verdict to object that they should have been indicted separately.

Jardine, on behalf of the receivers, moved in arrest of judgment, on the ground that they were indicted for having separately received parts of the stolen goods, and the acts of receiving proved were separate; they were charged with separate felonies, for which they ought to have been indicted separately.

Moody said, that the indictment had been so framed expressly to meet the case of *R. v. Mesingham*. (a)

PARKE B. The objection forms no ground for a motion in arrest of judgment. If there had been any thing in the point, you ought to have asked me to put the prosecutor to his election, if justice had required the separation, whilst the trial was going on, but you can take no advantage of the objection after verdict.

(a) *Moody's C. C. R.* 257.

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BRISTOL SUMMER ASSIZES.

Coram PARKE B.

Scholefield v. Roth.
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COATES v. STEPHENS.

BRISTOL,
August 18.
Hiddell v. Parsons et al.
J. Price & Co. 868.

ASSUMPSIT on the warranty of a horse.

Pleas, *Non assumpsit*; and, 2dly, That the horse was sound at the time of the sale.

The sale and warranty were clearly proved. The sale took place on the 20th July, 1837, and evidence was offered to show, that the horse, immediately on being taken home, was found to have a cough, and was submitted to medical treatment; the cough got worse, and on the 7th August the horse was examined by a veterinary surgeon, who pronounced him to be unsound, from diseased bronchial tube and chronic inflammation, cough being an incident of the disease; and also that the horse was lame from an enlargement of hock, amounting to bone spavin.

A cough, at the time of the sale of a horse warranted sound, is an unsoundness and breach of the warranty, though it be afterwards cured without any permanent injury to the horse.

For the defendant evidence was offered, that the horse was not afflicted either with cough or spavin at the time of the sale; that the horse was sound at the time of the trial, and free from both cough and spavin; and it was contended, that the cough either commenced after the sale, or, at all events, was so slight at that time as not to

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amount to unsoundness, and to be capable of being cured, which, in fact, it had been.

PARKE B., in summing up, said, I have always considered, that a man who buys a horse warranted sound, must be taken as buying for immediate use, and has a right to expect one capable of that use, and of being immediately put to any fair work the owner chooses. The rule as to unsoundness is, that if at the time of the sale the horse has any disease, which either actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description; or which, in its ordinary progress, will diminish the natural usefulness of the animal; or if the horse has, either from disease or accident, undergone any alteration of structure, that either actually does at the time, or in its ordinary effects will, diminish the natural usefulness of the horse, such a horse is unsound. If the cough actually existed at the time of the sale, as a disease, so as actually to diminish the natural usefulness of the horse at that time, and to make him then less capable of immediate work, he was then unsound: or if you think the cough, which, in fact, did afterwards diminish the usefulness of the horse, existed at all at the time of the sale, you will find for the plaintiff. I am not now delivering an opinion formed on the moment on a new subject; it is the result of a full previous consideration; but as I find I differ from the law as laid down by a learned judge in a case which has been handed up to me (a), I will thank you, if you find for the plaintiff, to tell me on which ground you so find.

(a) *Bolden v. Brogden*, 2 Moo. & Rob. 113.

Verdict for the plaintiff, generally. (a)

Crowder and Butt for the plaintiff.*Bompas Serjt. and Stone* for the defendant.

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(a) There are decisions somewhat conflicting as to whether a cough, existing at the time of a sale, be or be not an unsoundness; or whether that question should depend on the subsequent event of the malady being cured or not. (See *Elton v. Brogden*, 4 Camp. 281.; *Liddard v. Kain*, 9 Moore, 356.; *Shillito v. Claridge*, 2 Chitty, 425.; *Garment v. Barrs*, 2 Espin. 673.; *Bolden v. Brogden*, *suprà*, 113. *Jones v. Cowley*, 4 B. & C. 448.

A similar definition to that laid down in the principal case is found in a work of great merit, and of extensive circulation in the sporting world, and amongst the class of persons exercising the veterinary art, namely, the *Treatise on the Horse*, published by the Society for the diffusion of Useful Knowledge, p. 961. It would seem nearly impossible to attach any idea to the term "cough" not ranging under the term "disease," and equally difficult to make disease consist with soundness in any animal. In regard, however, to unsoundness, resulting from, or consisting in, an alteration in the natural structure of the animal, there is an ambiguity in the terms "natural" and "alteration of structure." If they mean an alteration of the structure or usefulness given by nature to the particular animal, then a horse born blind, or with an enlargement necessarily producing lameness, must be considered sound. (See, however, *Joliff v. Bendell*, Ry. & Mo. 136.) On the other hand, if the structure meant, be that natural to horses in general, then the class of cases open to litigation would be that of horses so badly shaped as to approach deformity (See *Dickinson v. Follett*, 1 M. & Rob. 299.) As it may now be considered as settled law, that the breach of a warranty of soundness, does not entitle the purchaser to return the horse, but only to recover the difference of value of the horse with, or without the particular unsoundness, the question of temporary maladies, producing no permanent deterioration of the animal, would, generally speaking, only involve the right to damages merely nominal.

CASES

ARGUED AND DECIDED

AT NISI PRIUS

IN Q. B. & EXCHEQUER,

AT THE SITTINGS AFTER

MICHAELMAS TERM,

2 VICT. 1838.

SITTINGS IN QUEEN'S BENCH AFTER TERM.

1838.

WESTMINSTER,
December 7.

WILSON (Executor of Wilson, surviving Partner of Wilson and Brown, Attorneys) v. KNAPPS and Another.

An order to refer an attorney's bill to taxation, and an allocatur thereon, after attendance on the master by the party's new attorney, are sufficient evidence of the business having been done, though there be not the usual undertaking to pay, in the order.

ASSUMPSIT for business done by *Wilson* and *Brown* as attorneys.

Pleas, *Non assumpsit*, and set-off.

The plaintiff, in proof of his claim, put in a judge's order, made in this cause, to refer the bills, which had been delivered to the defendants, to the Master for taxation, and the Master's allocatur, for a certain sum, but there was no undertaking to pay. It was also proved that the present attorney

be not the usual undertaking to pay, in the order.

for the defendant attended the taxation upon which the Master made his allocatur.

No proof of any business being done was given.

Sir *F. Pollock* objected that there was no evidence to go to the jury without proof of the business having been done, the order not being in the usual form which contains an undertaking to pay; and that the only thing referred under such an order as this would be the fairness of the charges.

Lord DENMAN C. J. I think it is *prima facie* enough, the present attorney having attended the Master; and it must be taken that the whole matter was gone into, and that the business was shown to have been done.

Verdict for the Plaintiff.

Platt and *Whateley* for the plaintiff.

Sir *F. Pollock* and *Busby* for the defendants.

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1838.

RUSH (Special Administrator, according to the Statute 38 Geo. 3. c. 87. (a) of the goods, &c. of *Helen Frances Phæbe Abercromby*, and by a certain order of the Court of Chancery, made in a cause *Wheatley v. Burdett*, appointed to collect and get in the outstanding personal estate of the said *Helen Frances Phæbe Abercromby*) *v.* PEACOCK and Another.

A document deposited in a Court of Equity, by a party to a suit there, and scheduled in his answer, but which remains with an officer of that Court, after an order to deliver it to the party, is sufficiently in the control and power of such party to let in secondary evidence after notice to produce, and nonproduction thereof by the party.

In an action by a special administrator, under st. 38 G. 3. c. 87., the declarations of the executor named in the will, made by him whilst he was the acting executor, are not admissible against the plaintiff.

COVENANT on a policy of insurance, bearing date the 20th April, 1830, and entered into between the said *Helen Frances Phæbe Abercromby*, of the one part, and the two defendants (directors of the

(a) This act of parliament does not appear to be frequently resorted to — there appears to be only one reported case upon it. See *Taynton v. Hannay*, 3 B. and P. p. 26. 7 Ves. 460. S. C. By the 1st section of the act, it is enacted, “ That at the expiration of twelve calendar months from the death of any testator, if the executors or executor to whom probate of the will shall have been granted are or is then residing out of the jurisdiction of His Majesty’s Courts of Law and Equity, it shall be lawful for the Ecclesiastical Court which hath granted probate of such will, upon the application of any creditor next of kin, or legatee, grounded on the affidavit herein-after mentioned, to grant such special administration as hereinafter is also mentioned.” By the 2d section, the party applying to the Spiritual Court for such special administration is to swear to a debt due to him from the testator, that the executor is out of the jurisdiction, and that the deponent is desirous of exhibiting a Bill in Equity for the purpose of being paid his demand out of the assets of the testator. Section 3.

Eagle Insurance Company), of the other part, for the sum of 9000*l.* payable to the executors, &c. of the said *H. F. P. Abercromby*, in the event of her dying within the space of two years then next. The declaration averred that the said *H. F. P. Abercromby* made her will, appointing one *Thomas Griffiths Wainwright* her executor, and died within the two years; the declaration also averred, that probate was, on the 21st May, 1831, granted to the executor *Wainwright*, and that he residing out of the jurisdiction of His Majesty's Courts of Law and Equity, special administration was granted to the plaintiff on 26th Nov. 1836, according to the form of the statute 38 *Geo. 3. c. 87.*; and that the plaintiff, before the commencement of this suit, was, by an order of the Court of Chancery, made in a suit there between *Wheatley* and *Burdett*, appointed to collect and get in the outstanding personal estate of the deceased.

There were several pleas averring that the policy was obtained by means of a fraudulent conspiracy, entered into between the deceased and *Wainwright* for the purpose of defrauding the defendants and various insurance companies, by pretending that the insurances were effected by the deceased for her own benefit, and on her own account, whereas

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gives the form of the letters of administration, and section 4. enacts, " That it shall be lawful for the Court of Equity in " which such suit shall be depending to appoint (if it shall be " needful) any persons or person to collect in any outstanding " debts or effects due to such estate, and to give discharges " for the same, such person or persons giving security in the " usual manner duly to account for the same."

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they were in truth entered into for the benefit and on the account of *Wainewright*; also, that the policy was void by reason of the concealment of material facts by the assured; also, that it was made by the orders and for the use and benefit of *Wainewright*, who had not any interest in the life insured, and that it was consequently null and void under the statute 14 *Geo. 3. c. 48*.

A notice had been served on the plaintiff's attorney, Mr. *Frampton*, to produce a certain other policy of insurance effected on the same life about the same time, and (as was alleged) under similar circumstances.

The plaintiff not producing the policy, the defendants tendered secondary evidence of it; and in order to shew that the best evidence was under the control of the plaintiff, a witness was called, who said that the policy in question had been produced by Mr. *Frampton*, as the attorney of the then plaintiff, in a former action, brought by *Wainewright*, the executor named in the will of *H. F. P. Abercromby*, against the *Imperial Insurance Company* (a). On cross-examination, the witness said he had last seen the policy, a fortnight ago, in the Master's office in the equity side of the Court of Exchequer, where it had been deposited as one of the documents produced by the present plaintiff in a suit for discovery brought against him there by the present defendants, and (as usual) was scheduled in his answer.

(a) See a report of this case, *Wainewright v. Bland*, Vol. I. p. 481.

The defendants then called Mr. *Bowyer*, the clerk in court of *Rush* in the Equity Court, who said he had the policy with him in court, but declined producing it. He admitted that an order had been made by the Lord Chief Baron directing the policy in question, amongst others, to be delivered up to Mr. *Frampton*, the attorney for the defendant in the equity suit, at the expiration of a fortnight from the date of the order, which fortnight had elapsed some days before the present trial.

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v.
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Erle and *Cresswell* objected that the defendants were not in a condition to give secondary evidence of the contents of the policy. It was clear that the document was in the custody of the law in the equity side of the Court of Exchequer. It was brought there by the present plaintiff, as part of his answer to a bill filed against him, and in obedience to the authority of the court; and if the defendants now wanted to have the document produced in court, they could only do so by producing it as part of the answer, and were bound to read the answer too.

Sir *F. Pollock*, *contra*, insisted that, as it was clear, on the evidence of Mr. *Bowyer*, that the plaintiff might, before the trial, have obtained actual possession of the policy, it must be deemed under his control. If so, and he does not choose to produce it, the defendants are entitled to give secondary evidence.

LORD DENMAN C. J. That certainly is my opinion. The Equity Court has, for all practical

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purposes, restored these documents to the attorney for the plaintiff. He might have produced them if he chose; by declining to do so, he opens the door to secondary evidence. I cannot, indeed, compel the plaintiff's attorney to produce the policy, though it is now brought into court by Mr. *Bowyer*, as his agent; but by declining to produce it, he opens the door to secondary evidence of the contents.

Secondary evidence was accordingly given.

The defendants tendered evidence of declarations made by *Wainewright*, whilst he was executor, and before the proceedings had taken place for having the present plaintiff appointed special administrator under the statute. The witness, to prove the declarations, had gone to *Calais* for the purpose of taking *Wainewright's* answer to a bill for a discovery filed against him in the suit before adverted to, of *Wainewright v. Bland*; and the declarations were said to have been made by *Wainewright* on the occasion of his swearing to the answer.

Erle objected to the evidence. The declarations are those of a stranger to the suit; and the present plaintiff claims under a title quite independent of him.

The Attorney-General, contrd. All the acts of the executor, between the death of the testator and the time when he ceased to be executor, are admissible in evidence against the plaintiff: the titles of the two individuals link in together, and they may be treated as one executor. If *Wainewright* had died, and an administrator *de bonis non*

had been appointed, would not *Wainwright's* declarations have been evidence against the administrator *de bonis non*? Again, supposing *Wainwright* had released a debt, whilst he continued to represent the deceased, would not that release be available as against a party stepping, as the plaintiff here does, into *Wainwright's* place? It appears that a bill for a discovery has been filed against *Wainwright*, as representing the deceased, and that he has put in an answer to that bill; would not that answer be evidence against all others who subsequently represent her? And if the answer would be evidence, why not the declaration? for the addition of the oath cannot affect the admissibility, though it may affect the weight of the evidence.

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LORD DENMAN, C. J. The acts of the original executor, done by him in that capacity, may be admissible in evidence against the plaintiff who has succeeded, *durante absentia*, to the office of executor. But I do not think the mere declarations of the executor stand on the same footing. I am not aware that the point has ever arisen, but I think I ought not to receive the evidence.

The evidence was accordingly rejected.

Verdict for the defendants on all the pleas. (a)

(a) This cause was tried at the *Middlesex* sittings after *Trinity* term. In the following *Michaelmas* term *Erle* obtained a rule to shew cause why the verdict should not be set aside on account of an alleged misdirection of the learned Lord Chief Justice, unconnected with the points above reported. That rule is still undisposed of.

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Erle, Cresswell, and J. Henderson for the plaintiff.

The Attorney-General, Sir F. Pollock, Thesiger, and Robinson, for the defendants.

WESTMINSTER,
 December 4.

BRIGGS v. AYNSWORTH.

The plaintiff in an action on the case gave, as confirmatory evidence of the defendant's having committed the tort proved at *Layton*, proof that he was seen near the spot at the time in question, and the defendant called witnesses, who swore that the defendant was at *Richmond* at that time. The plaintiff was allowed to give in reply additional evidence of the defendant's being at *Layton*, such evidence being a direct contradiction of the new fact of the defendant's being at *Richmond*.

CASE for negligent driving of defendant's carriage against a carriage of the plaintiff.

Plea, Not Guilty.

The plaintiff gave evidence that his carriage was run against at *Layton*, in *Essex*, by another carriage, which the witnesses described as being driven by the defendant; and he called witnesses to show that, about the time in question, the defendant was seen in the neighbourhood of the spot where the collision occurred.

The defendant called witnesses to prove that, at the time in question, he was not at *Layton*, but at *Richmond*, in *Surrey*; and during the progress of the plaintiff's case, the plaintiff's witnesses were cross-examined as to their being certain of the identity of the defendant with the driver of the carriage.

The defendant having closed his case, *Platt*, for the plaintiff, proposed to call further witnesses to disprove the defence, by showing that the defendant was not at *Richmond*, but at *Layton*, at the time in question: whereupon

Butt, for the defendant, objected that it was not competent to the plaintiff to take the course proposed: the plaintiff's attention had, by the form of the cross-examination of his witnesses, been directed to the importance of showing that the defendant was at, or in the neighbourhood of, *Layton*. He had shaped his case accordingly; and having examined some witnesses to prove that the defendant was at *Layton* on the day, he should have exhausted that line of evidence, and not have reserved part of it to bring forward in reply.

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LORD DENMAN C. J. said, it would, perhaps, have been more correct had the plaintiff in the first instance called the witnesses now tendered; but he did not think that he could, even at this period of the cause, exclude evidence from the jury which certainly went to contradict the defendant's *alibi*.

The witnesses were accordingly called, and swore that the defendant was not at *Richmond*, for that they saw him at *Layton* at the very time he was said to have been at the former place.

Verdict for the defendant. (a)

(a) The admissibility of the evidence called in reply in this case would seem substantially to depend upon the grounds upon which the witnesses were prepared to deny the defendant's *alibi*. If the defendant's case had been that, at the time of the collision, he was at some ascertained and identifiable spot (say at any given house), distant from the scene of the collision, there can be no doubt that the plaintiff might have called, in reply, witnesses who were at that spot, and could prove that the defendant was not there; for evidence of that kind could

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Platt and James for the plaintiff.*Kelly and Butt* for the defendant.

not have been given by the plaintiff in chief, there having been no suggestion during the progress of his case pointing to the spot now made material by the defendant's witnesses; but if the plaintiff's witnesses, called in reply, were to disprove the defendant's *alibi*, only by shewing that they had seen him at the place where the collision occurred at the time in question, then such evidence appears to have been inadmissible in reply, inasmuch as it belonged to a species of evidence which the plaintiff might have given in chief; which he did, indeed, enter upon in chief, and should therefore then have exhausted. It would seem that, if tried by this test, the evidence received in reply was, in principle, hardly admissible; for the witnesses had no other means of knowing that the defendant was absent from *Richmond*, except that they had seen him at *Layton*. There is, however, undoubtedly some difficulty in reconciling the rejection of the evidence with the formal rules of proceeding; for as the allegation by the defendant's witnesses of his having been at *Richmond* was an allegation of entirely new matter, the plaintiff seems, *prima facie*, entitled to call witnesses in reply to disprove it; but even if this were conceded, it is apprehended that he was bound to stop there, and had no right to prove by those witnesses the further fact that they had seen the defendant at *Layton*.

C A S E S
 ARGUED AND DECIDED
A T N I S I P R I U S
 IN C. P. AND EXCHEQUER,
 AT THE SITTINGS AFTER
M I C H A E L M A S T E R M.
 2 VICT. 1838.

ADJOURNED SITTINGS IN THE EXCHEQUER.

GOULD v. BARRATT.

Doc. of Dray. & Pillitter
11. Dec. 1838.
22 L. J. Exch. 275.
13 Dec. 1838.

December 5.

CASE for a malicious arrest in the Lord Mayor's Court.

After proving the proceedings and verdict for the present plaintiff (the defendant below), and the taxation of costs as between party and party,

In case for a malicious arrest, the plaintiff is entitled to recover costs incurred in the former suit beyond the taxed costs in that suit

Sir *F. Pollock* asked the attorney for the plaintiff the amount of the expences beyond the sum allowed on taxation.

Platt objected that the plaintiff was precluded from claiming any sum beyond the taxed costs.

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LORD ABINGER. The taxed costs are only the costs between party and party; the party is really put to expences beyond this, and is entitled to the costs as between attorney and client. (a)

Verdict for the defendant.

Sir *F. Pollock* and *Rowe* for the plaintiff.

Platt and *F. Kelly* for the defendant.

LONDON,
December 14.

BARBER v. WOOD.

A witness is not bound to obey a subpoena altered by the attorney from the sittings for which it was originally sued out to subsequent sittings without being re-sealed. Whether a subpoena has been served in reasonable time before the trial is matter for the court. Service on a person living close to the place of trial, at half past eleven o'clock in the morning, for a cause called on at two o'clock, is not in sufficient time.

CASE against the defendant for not attending in pursuance of a *subpœna duces tecum*, as a witness at the *Middlesex* sittings after *Trinity* term, 1838, on the trial of an action wherein one *Curtis Williamson* was the plaintiff, and the present plaintiff was defendant.

Pleas. 1st, Not Guilty. 2dly, That the plaintiff had no defence to the original action. There were also various other pleas, traversing allegations contained in the declaration, and, amongst others, that the defendant could not have appeared as a witness, or produced the letters, papers, &c. referred to at the time mentioned. Upon all those pleas issue was joined. 9th, That plaintiff did not cause the subpoena to be shewn to defendant within a reasonable time before the trial for him to appear; to which the plaintiff replied, that he did cause, &c., and issue was joined thereon.

At the trial it appeared that the subpoena had

(a) See *Roscoe on Evidence*, 390.

been originally sued out for the *Middlesex* sittings after *Easter* term, 1838, at which time the cause was in the paper for trial. The cause, however, was not then tried, nor was the subpœna served. The cause being again in the paper for trial at the sittings after *Trinity* term, 1838, the day of appearance in the subpœna was altered by the attorney for the present plaintiff (the defendant in the previous action) from the 14th *May* to the 19th *June* (the hour of appearance remaining the same, *i. e.* nine in the forenoon). The subpœna was not re-sealed. The subpœna so altered was served upon the defendant at his place of business, within five minutes' walk of *Westminster Hall*, at half-past eleven on the morning of the 19th of *June*. The defendant did not make any objection on the ground of the shortness of the notice, but said he would not attend. The cause was tried about two o'clock in the afternoon of the same day.

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D. Pollock and *Wordsworth*, for the defendant, contended, 1st, That the subpœna was invalid, not having been re-sealed subsequently to the alteration. 2dly, That, supposing it to be valid, it had not been served on the defendant within a reasonable time; whereof the court, and not the jury, ought to decide. In support of the 1st point, they cited *Sydenham v. Rand* (a), *Phill. Ev.* 782. 8th edition. In support of the 2d, *Hammond v. Stewart* (b); *Alexander v. Dixon* (c); *Poston v. Rose*. (d)

(a) 3 Doug. 459.

(b) 1 Strange, 510.

(c) 1 Bingh. 366.

(d) 4 Carr. & P. 271.

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Erle, for the plaintiff, contended that, previous to the service of a subpoena, it might be altered by the party suing it out; that such was the daily practice, and had never been held to be irregular. As to the other point, he contended that, though in applications for an attachment for a contempt, the court was to determine as to whether the subpoena had been served within a reasonable time or not, yet, in actions between party and party for the injury done by the non-appearance, the question was one properly for the jury.

LORD ABINGER C. B. If such a practice does prevail as has been stated, I am clearly of opinion that it is an objectionable and irregular practice. If any alteration at all be allowable, I do not see under what principle a party could be prevented from altering the name of the cause in which the subpoena issued; but I think that no private individual can have any right, upon his own authority, to alter the writ of the court in any respect. This subpoena, therefore, at the time of its service on the defendant was a nullity.

As to the other point, I am of opinion that it is for the judge, and not the jury, to determine whether or not the subpoena has been served within a reasonable time before the trial. Were the question simply, whether or not this party had been guilty of a contempt, clearly it must have been decided by the judge, and not by the jury. And that question wholly depends on whether the service was, or was not, within a reasonable time. If it was, then the party has been disobedient to the process of the court, and thereupon is guilty

of a contempt; if it was not, then he has not been guilty of a contempt. Now, the plaintiff's right of action also depends upon the question whether the service was or was not within a reasonable time; and the question being the same, it must be answered by the same authority, viz. that of the judge. However, in case it should become material to ascertain the correctness of my taking this course, I will ask the jury whether they are of opinion that the service was within a reasonable time?

The jury said they were of opinion that the subpoena had not been served a sufficient time before the trial.

Lord ABINGER. I quite concur in that opinion.

Verdict for the defendant on the 1st, 2d, and 9th issues, for the plaintiff on the remaining issues.

Erle and Humfrey for the plaintiff.

D. Pollock and Wordsworth for the defendant.

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v.
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1838.

ADJOURNED SITTINGS IN THE COMMON PLEAS.

JACKSON *v.* BULL and ALISON.

Where, in case for a malicious charge of felony, the plaintiff puts in, to prove a formal part of his case, the defendant's and another person's depositions before the magistrates, the defendant has a right to use his own deposition as evidence in the cause, but not that of the other deponent.

CASE for a malicious charge of felony made before magistrates without reasonable and probable cause.

Plea, Not Guilty.

In proving the plaintiff's case, it became necessary, under a ruling of the Lord Chief Justice, after argument, that the deposition made before the magistrate by the defendant *Alison*, and that of *Whorrel*, a witness on that occasion for the now defendants (and who was in court at the time of the present trial), should be read, as part of the plaintiff's case, in order to prove the charge, and the dismissal of it, which dismissal was written by the magistrate on *Whorrel's* deposition.

Wilde Serjt., in addressing the jury for the defendants, was arguing on the facts stated in *Alison's* depositions, as well as *Whorrel's*, as facts sworn to, and as forming part of the probable cause.

Shee objected to either deposition being so used as evidence; the first as the evidence of the party in the cause; that of *Whorrel* as the evidence of a witness who might be called.

TINDAL C. J. I think the rule is this : — that the evidence given by the prosecutor at the trial charged to be malicious is, from the necessity of the case, an exception to the general rule that a party's own statement is not admissible in his own favour. In prosecutions, the party, for the purposes of public justice, is bound to give his evidence on oath ; and, in such an action as this, such oath is evidence for him, as shewing the grounds on which he acted. In many cases the party whose goods have been stolen may be the only witness. With regard to the deposition of the other person, perhaps if its production had been more strongly objected to, on the ground that it was tendered, as it is now proposed to be used, only as evidence of the facts stated, I should not have compelled the plaintiff to put it in evidence ; but as it is, I am clearly of opinion, and shall so tell the jury, that they must not take the facts in it as facts sworn to in this cause. If the defendants' counsel wishes to rely on those facts, he must call the witness. The defendants' own deposition is properly in evidence as part of the plaintiff's case, and falls within the exception to the general rule ; and the counsel for the defendants may comment on the facts as sworn to in this cause. It would be very unjust (a) if a party's own deposition were not evidence in his favour when charged with a malicious prosecution, inasmuch as it may happen he may have been the only witness in the case ; and the jury may have thought he had made a mistake in the identity, or in some other respect ; and if his own oath were

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JACKSON
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(a) *Roscoe*, 386. ; *Bull*, N. P., 14, 15.

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not admissible, he would be handed over to such an action as this bound hand and foot, without the possibility of defence.

Verdict for the plaintiff, damages 10*l.* (a)

Shee and *Lee* for the plaintiff.

Wilde Serjt. and *Gurney* for the defendants.

(a) In the following term *Wilde*, Serjt., obtained a Rule to shew cause why the verdict should not be set aside, and a new trial had, on other grounds, which Rule has been since made absolute ; but no objection was made to the ruling of the Lord Chief Justice.

CASES

ARGUED AND DECIDED

AT NISI PRIUS

IN THE COURTS OF

Q. B., C. P., AND EXCHEQUER,

AT THE SITTINGS AFTER

HILARY TERM,

2 VICT.

IN THE QUEEN'S BENCH.

ADJOURNED SITTINGS IN LONDON.

ROGERS *v.* CUSTANCE.

1839.

GUILDHALL,
Feb. 21.

ASSUMPSIT for work and labour, &c.

Plea, *Non-assumpsit*.

The action was brought against the defendant as contractor for work on a railway, by the plaintiff who had been employed by him therein. The work had been done under the superintendence of one *Coulson*, an engineer; and to prove that the latter was agent for the defendant, the plaintiff wanted to give in evidence, that he had sent in to the defendant an account of a small part of the work, and that the defendant referred him to *Coulson*; that the account was accordingly taken

In an action for work and labour, a notice to produce "all accounts relating to the matters in question in this cause," is sufficient to let in secondary evidence of an account of work done, given by the plaintiff to the defendant, without specifying it by date or otherwise.

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ROGERS
v.
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to *Coulson*, who signed it and returned it to the defendant; and that the defendant then observed, it was all right. The plaintiff called for the production of this account.

The plaintiff had served the defendant's attorney with a notice, requiring him to produce "all books, extracts, letters, accounts, and copies of letters and accounts, papers, and writings in any way relating to the matters in question in this cause." It appeared, that many small accounts for different parts of the work had been sent in by the plaintiff to the defendant.

It was contended for the defendant, that the notice was too vague, and that it should have pointed more distinctly to the particular document required; indeed, the instrument now spoken of was not properly an *account at all*.

Thesiger, for the plaintiff, cited *Jacob v. Lee (a)*, as an authority to shew that the notice was sufficient. The defendant could not be ignorant that this was one of the accounts referred to in the notice.

Lord DENMAN C. J. ruled, that the notice was sufficient to let in secondary evidence of the contents of the document referred to, but said he would take a note of the objection.

Verdict for the plaintiff.

Thesiger and *James* for the plaintiff.

Sir *F. Pollock* and *G. Wilson* for the defendant.

(a) *Suprà*, p. 33.

In the following term Sir *F. Pollock* moved for a new trial on several grounds, one of which was, that secondary evidence of the instrument ought not to have been received. The court, after consideration, refused the rule, on the ground of the secondary evidence having been admitted, but granted a Rule to shew cause on the other grounds. The Lord Chief Justice said, the court did not mean to lay down any general rule as to what the notice ought to contain; that much must depend on the particular circumstances of each case; but where enough was stated on the notice to leave no doubt that the party must have been aware the particular instrument would be called for, the notice must be considered sufficient to let in secondary evidence. The court thought the defendant must have been aware, in the present case, that this account was one of those required.

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 ROGERS
v.
 CUSTANCE.

IN THE COMMON PLEAS.
 ADJOURNED SITTINGS IN LONDON.

HEATH *v.* WILSON.

GUILDHALL,
Feb. 19.

CASE for negligence in defendant's servant, in driving the defendant's one-horse carriage against the plaintiff in the public highway, knocking her down, and thereby injuring, &c.

Where a master entrusts his servant with his carriage for a given purpose, and the servant drives it for

another purpose of his own, in a direction different from that ordered by his master, and in so doing negligently drives over a person, the master is liable for such negligence.

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v.
WILSON.

Pleas. Not Guilty. 2dly, That defendant was not possessed of the said carriage and horse. 3dly, That the carriage was not under the care and guidance of the defendant by his servant, nor was the defendant driving the said carriage by his servant in manner and form, &c.

The plaintiff was knocked down, in crossing the *Old Street Road*, by a four-wheeled carriage belonging to defendant, and driven by his servant, and was seriously injured thereby.

There was the usual conflicting evidence as to the cause of the accident ; and besides contending, that the accident was not caused by the negligence of the servant, the counsel for the defendant proved that the defendant, who lived at *Turnham Green*, had driven into town on the day in question, and had quitted his carriage at *Stamford Street*, *Blackfriars Road*, and sent his servant to put up the horse and carriage at some stables near *Leicester Square*. The servant, instead of going to the stables, went to a place beyond *Old Street Road*, two miles in a different direction from the stables, to deliver a parcel of his own to some relation, and in returning through *Old Street Road* drove over the plaintiff; and it was contended, that the servant not being in the execution of his master's business, but entirely disobeying his master's orders in going to *Old Street Road*, the master was not liable, and *M'Manus v. Crickett (a)* was relied on.

For the plaintiff, *Joel v. Morrison (b)* was relied on.

(a) 1 E. R. 106.

(b) 6 Carr. and P. 501.

ERSKINE J., in summing up, told the jury that, in point of law, the defendant was liable for the negligence of the servant in driving the carriage under the circumstances above stated; though, if the servant had taken out his master's carriage without his direction, the master might not be liable for his negligence, as in that case he could not be said to have entrusted the servant with the direction of his carriage. But here the master had, in fact, entrusted the servant with the direction of his carriage, for the purpose of taking it to the stables; and it was no answer to say, that the servant had misconducted himself in another respect, besides the negligence in executing his master's orders. The master, by entrusting him with the carriage, puts it in his power to do the damage. Till the carriage was in fact deposited at the stables, the servant must be considered in the execution of his master's service, and the master continues responsible.

Verdict for the plaintiff, damages 25*l*.

Wilde Serjt. and *Channel* for the plaintiff.

Slade for the defendant.

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HEATH
v.
WILSON.

1839.

IN THE EXCHEQUER.
SITTINGS AT WESTMINSTER.

Brancher v. Holman
19. L. J. C. P. 310-
WESTMINSTER,
Feb. 5.

DARBY v. SMITH.

In trespass, where a justification is pleaded, to which the plaintiff new assigns that the action is brought for another and different trespass than that mentioned in the plea, and not guilty is pleaded to the new assignment; if the plaintiff gives in evidence only one trespass, it is incumbent on him to show that the trespass so given in evidence is clearly a different one from that mentioned in the plea. If the circumstances are alike, the jury ought to consider it to be the same.

THIS was an action of trespass for an arrest and false imprisonment.

Pleas. 1st, Not Guilty. 2d, A judgment of the *Middlesex* Court of Requests, obtained by the defendant against the plaintiff, for 1*l.* 19*s.* 11*d.* debt and 3*s.* 6*d.* costs; the whole of which remaining unpaid, the defendant, on 11th of *June*, caused a writ or warrant of execution to be duly issued for 1*l.* 19*s.* 11*d.* debt, 3*s.* 6*d.* costs, and 3*s.* 4*d.* costs of execution, making together 2*l.* 6*s.* 9*d.* under which the plaintiff was arrested and imprisoned.

Replication, taking issue on the plea of Not Guilty; and as to the second plea, new assigning another and different arrest and imprisonment than that justified. To which the defendant pleaded Not Guilty.

To prove the plaintiff's case on the new assignment, *Butt* put in and proved a judgment and execution, the same as that mentioned in the defendant's second plea; and proved, that after the date and issuing of such execution on the 11th of *June*, payments on account were made by the plaintiff to the defendant, amounting to 24*s.* that the

execution was originally indorsed to levy for debt and costs 2*l.* 6*s.* 9*d.*, but was afterwards altered by giving credit for 1*l.* 4*s.* paid, and directing the officer to levy the balance only, *viz.* 1*l.* 2*s.* 9*d.*, and that on the 20th of *September* the plaintiff was taken in execution for 1*l.* 2*s.* 9*d.* On objection being made by *Erle* for the defendant, that the evidence only proved the trespass justified by the plea, and admitted by the new assignment to be so justified, *Butt* contended that the variance in the sum was material, and showed an arrest on a writ different from that specified in the plea; and he insisted that, though two imprisonments were alleged by the plaintiff on the pleadings, it was enough for him to show one, if it differed essentially from that confessed to be justified; and he said that PARKE B. had at first ruled, in a case on the Western Circuit, where the pleadings were similar to the present, that the plaintiff must prove two assaults; but, in the course of the trial, had intimated a change of opinion.

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DARBY
v.
SMITH.

Erle for the defendant contended, that the plaintiff had, in fact, proved the justification set out in the plea; and, unless the plaintiff showed some other imprisonment which he meant to confess, the defendant had a right to rely on the plea as applying to that in evidence; and the plaintiff could not insist on minute variations, which would be more applicable to a traverse of the plea than to a new assignment.

Lord ABINGER C. B. I do not mean to lay down a general rule, that on all occasions a plaintiff is

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bound to prove two trespasses. He might give in evidence under the new assignment, one so different in its circumstances from that justified, as to show it to be another and different one, according to the terms of the new assignment; but here the facts are so alike, and so nearly identical, that, unless the plaintiff show some other imprisonment, it must be taken by the jury to be the same as that confessed, and the defendant must have the verdict.

Butt then attempted to prove an arrest on the 7th of *July* in the same suit, but failed in this, and there was a

Nonsuit. (a)

Butt and *Cole* for the plaintiff.

Erle and *Thomas* for the defendant.

(a) See 1 Saund. 299 b. n.; *Oakley v. Davis*, 16 E. R. 82.

WESTMINSTER, BELCHER (Assignee of *Reynolds*, a Bankrupt)
Feb. 1. and GREEN v. M'INTOSH.

A covenant by a lessee, "to put premises into habitable repair," binds him to put them into such a state that they may be occupied, not only with safety, but with reasonable comfort, for the purposes for which they are taken.

ASSUMPSIT for breach of an agreement made between *Reynolds* and *Green* of the one part, and the defendant on the other part, whereby the defendant agreed to take of *Reynolds* and *Green* a dwelling-house, and certain stables and a yard, for the term of three years, from the 25th of *March*, 1834, at the yearly rent of 110*l.*, "and to put the premises into habitable repair within a reasonable

time, and to deliver up the same, together with the fixtures, at the expiration of the three years, in such state of habitable repair (reasonable wear and tear thereof, in the mean time, only excepted)."

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 BELCHER
 v.
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Breach, that the defendant did not, within a reasonable time, put the premises into habitable repair, but, on the contrary, suffered the same to be and continue wholly out of repair, fallen down, ruinous, dilapidated, and uninhabitable, and by reason thereof the lease, under which *Reynolds* and *Green* held the premises, became void; and one *Cullerman* (the grantee of the reversion) in *April* 1836 recovered possession of the premises by reason of the forfeiture, and determined the interest of *Reynolds* and *Green*.

Plea, that defendant did, within a reasonable time, to wit, within twelve months after the making the said agreement, put the said premises into habitable repair; and that the same were in such habitable repair at the time possession thereof was recovered, as in the declaration mentioned (reasonable wear and tear thereof in the mean time excepted), according to the true intent and meaning of the said agreement, and issue thereon.

It appeared that the original lease (for seventy-seven years), granted to one *Ellis*, and under which *Reynolds* and *Green* claimed, contained the usual covenant on the part of the lessee "well and sufficiently to repair, uphold, and keep the premises with all manner of needful and necessary reparations, &c.;" and the usual proviso for re-entry. At the time of the agreement between *Reynolds*, and *Green*, and the defendant, the premises (con-

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M'INTOSH.

sisting principally of stabling) were very old and greatly out of repair, the roofs leaky, and the buildings altogether in such a state that they could not be safely or properly used as a stable: there was conflicting evidence as to the state of the premises when possession was recovered by *Cullerman*, and the defendant proved that he had put work-people on to the premises, and expended about 80*l.* in repairs, during the time that he held the premises.

Crowder for the defendant contended, that as the terms of this agreement only bound him to put the premises into *habitable* repair, all that could be required of him was, that he should keep them wind and water tight; there was no express decision shewing to what measure of repairs a party was bound under such words; but if, at the time when the defendant was ejected, they were in such a condition that they could be used for the purpose of stables, without harm or danger to the animals kept there, the words of the agreement were, as he submitted, satisfied. He cited *Anworth v. Johnson* (a), and *Gutteridge v. Munyard* (b), and then addressed the jury, as to the condition in which the premises actually were.

ALDERSON B., in summing up to the jury, said, This is a case where the lessee was bound to put the premises into *habitable* repair, not merely to keep them in *habitable* repair (which would have reference to the state in which they were at the

(a) 5 Carr. and P. 239.

(b) 1 Moo. and Rob. 334.

time of the taking); but here the tenant was obviously intended to put the premises into a better state than he found them: what then is the reasonable construction of the term "putting into habitable repair?" It was difficult to suggest any material difference between the term "habitable repair" used in this agreement, and the more common expression "tenantable repair:" they must both import such a state, as to repair, that the premises might be used and dwelt in not only with safety, but with reasonable comfort, by the class of persons by whom, and for the sort of purposes for which, they were to be occupied. They were old premises and dilapidated; the agreement was not that the tenant should give the landlord new buildings at the end of his tenancy, but that he should take the premises out of their former dilapidated condition, and deliver them up fit to be occupied for the purposes they were used for.

In going through the particulars of dilapidation, the learned Baron said the jury should not hold the party very strictly to particular small items, but should look to the substantial question, and say, whether the covenant had been, according to the fair contemplation of the parties, performed.

Verdict for the defendant. (a)

Kelly and Martin for the plaintiff.

Crowder and Wightman for the defendant.

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BELCHER
v.
M'INTOSH.

(a) See *Stanley v. Towgood*, 3 Bing. N. C. 4.

1839.

WESTMINSTER,

CROWDER v. SELF and ANOTHER.

Feb. 7,
Taylor & Keenick
12. Feb. c. 222. 488.

In case for an excessive distress, though the warrant of distress be for a greater sum than is really due, the plaintiff is not entitled to a verdict, unless the goods seized are excessive in regard to the sum really due.

CASE for an excessive distress. The only charge in the declaration was, that the defendants had seized more goods than were sufficient to satisfy the amount of rent due by the plaintiff. It appeared that the warrant of distress contained a demand for 6*l.* rent in arrear, and some odd shillings for expences, the sum really due being only 4*l.*; and that the landlord had been led into a mistake as to the amount, by supposing that a sum of 2*l.*, which had been paid by the plaintiff, had been paid on account of an accruing demand for rent, and not for rent already due. A receipt had been given to the plaintiff shewing this fact; but the receipt was not produced until the fifth day after the broker's man had been in possession. When this receipt was shewn to the landlord, he immediately withdrew the distress, stating that he had been mistaken in the manner above alluded to.


After the case for the plaintiff had concluded,

Byles for the defendant contended that an action in this form could not be supported, unless some real damage was shewn; *Avenel v. Croker* (a), *Wilkinson v. Serres* (b); and in his address to the jury he insisted that there was no evidence to shew

(a) M. & Mal. 172.

(b) 1 Moo. & Rob. 377.

that the goods taken were more than sufficient to satisfy the arrear of rent (4*l.*) actually due.

1839.

 CROWDER
 v.
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 ANOTHER.

Lord ABINGER C. B., in summing up, told the jury, that the only question for their consideration was, whether, notwithstanding the sum of 6*l.* occurring in the warrant, the goods actually seized were more than sufficient to satisfy a distress for 4*l.* There was no evidence of any annoyance to the plaintiff's family other than the circumstance of the man being in the house; and if the jury thought that the same quantity of goods might have been fairly seized for an arrear of 4*l.*, then he thought they ought to find for the defendant.

Verdict for the plaintiff, damages one shilling. His Lordship certified to deprive the plaintiff of costs.

Miller for the plaintiff.

Byles for the defendant.

1839.

SPRING ASSIZES, 2 VICT.

NEWCASTLE.

Coram PARKE B. and ALDERSON B.NEWCASTLE,
March 4.

REGINA v. BOLAM.

A motion to put off a trial, on an indictment for felony, cannot be entertained till after plea pleaded. It is a good ground for putting off a trial, that the panel of jurors at the present assizes has been taken from a neighbourhood where an excitement has been raised against the prisoner likely to prevent a fair trial.

A TRUE bill of indictment having been found against the prisoner by the grand jury of the county of the town of *Newcastle*, for the wilful murder of *John Millie*, the prisoner was now brought up to plead; and *Dundas*, on his behalf, moved that the trial might be put off till the summer assizes.

Sir *G. Lewin*, for the prosecution, submitted that the application could not, in point of form, be entertained until the prisoner had pleaded.

The Court was of that opinion, and ALDERSON B. remarked, that, until the prisoner pleads, *non constat* that there will be any trial at all: it is plain, therefore, that a motion to put off the trial must be premature, if made before plea.

Dundas thereupon moved that the indictment might be removed into the county of *Northumberland*, under the statute 38 G. 3. c. 52. s. 3., which motion being granted, it was arranged that, for convenience, the application to postpone the trial should be made and disposed of now, it being understood that the prisoner should afterwards

be brought up to plead in the county court, and that the motion should then be *pro formâ* renewed.

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REGINA
v.
BOLAM.

Dundas accordingly now moved that the trial should be postponed, on an affidavit sworn by Mr. *Swinburne*, the prisoner's attorney, stating various facts to shew the prejudice and excitement which had prevailed against the prisoner, both in the town of *Newcastle* and the county of *Northumberland*, ever since the alleged murder of *Millie* in the month of *December* last. Amongst other facts it was sworn, that in *December*, when the coroner's inquest returned a verdict of wilful murder against the prisoner, a large assembled crowd received the verdict with applause and clapping of hands; that the local newspapers published all the evidence given on that occasion; and that they had from week to week since that time contained paragraphs highly prejudicial to the prisoner; *ex. gr.* that he had conveyed away his freehold property in anticipation of the trial; and occasionally giving portraits of him, and *fac similes* of his handwriting. In conclusion, Mr. *Swinburne* swore, that so much prejudice and excitement prevailed against the prisoner, both in the town of *Newcastle* and the county of *Northumberland*, amongst the class of persons from whom jurors are drawn, that he verily believed the prisoner could not have a fair trial at the present assizes. It was also sworn that it was, and long had been, the custom of this county to take the panel of jurors from the vicinity of *Newcastle* at the spring assize, and from the more distant parts of the county at the summer assize.

1899.

REGINA

v.

BOLAM.

Sir *G. Lewin* resisted the application,— first, on the ground that the prisoner should have made this application long ago to the Court of Queen's Bench (*Rex v. Mead*) (a); but principally on the ground that the facts deposed to, though they shewed that a strong interest was taken by the neighbourhood in the discovery of the offender, did not (as he contended) shew any anxiety to fix the offence on the prisoner; and he insisted that a motion of this nature ought to be acceded to only where the excitement in the neighbourhood is of such a nature as may be reasonably supposed to *deter* jurymen from giving a conscientious verdict; for example, in the case of death arising in the *Luddite* riots, and on other political occasions.

PARKE B. This certainly is a novel application, and one to which I was at first by no means disposed to accede, because one cannot help foreseeing that it may be made a precedent for other applications of the like kind. But the affidavit discloses facts which satisfy me that the prisoner can hardly be expected to have a fair trial at the present assize, and I feel bound, therefore, to postpone it. The publication of the evidence given before the coroner was, in itself, highly improper, and might have been made the ground of indictment against the publisher; and the excitement, arising from that first act, has been kept up since by numerous publications, down to so late a period

(a) 3 Dowl. & Ry. 301. 305.

as the middle of last month, all directed not merely against the offence itself (as the prosecutor's counsel suggests), but against the prisoner, as the person who committed it. But what most weighs with me is, that, from the manner in which the jury panels are made up in this county, it appears that, if the trial takes place now, it will probably be before persons living in the very midst of this excitement, whereas, if it be postponed until the summer, the jurors may probably be drawn from a distance. On the whole, therefore, I think the trial ought to be postponed until the summer assizes. In regard to the lateness of the application, it would be unreasonable to expect a prisoner to decide upon a matter of this sort, until the grand jury have found their bill.

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REGINA
v.
BOLAM.

ALDERSON B. I concur in the judgment of my brother PARKE. I yield to the peculiar circumstances of the case, wishing it to be understood that I am by no means disposed to encourage a precedent of this sort. The manner in which the jury panel appears to be made up in this county is a material circumstance, and one which does not apply in ordinary cases.

The trial was accordingly postponed, and the recognizances respited until the next assizes.

Sir G. Lewin, Grainger, and Wortley for the prosecution.

Dundas and Knowles for the prisoner.

1839.

DURHAM.

Coram PARKE B.

DURHAM.

REGINA v. BUTTERWICK.

To constitute the forgery of a bill of exchange, within 1 *W. 4. c. 66. s. 4.*, the instrument must be complete. Forging an acceptance to an instrument in the form of a bill, but without the drawer's name, is not within the statute.

INDICTMENT for forging the acceptance of one *John Chapman* to a certain bill of exchange.

It appeared that, at the time when the prisoner caused a lad to write the name of "John Chapman" across the bill, as the acceptor thereof (which the lad innocently did), a blank was left in the bill for the drawer's name. The bill was now produced at the trial, when there appeared upon it the names of "Elstob and Butterwick" as the drawers.

PARKE B. held that the indictment was not supported, as the instrument to which the forged acceptance was affixed was not, at the time of such supposed forgery, a bill of exchange, there being no drawer's name. His Lordship referred to the terms of the stat. 1 *W. 4. c. 66. s. 4.*, which do not make it forgery merely to counterfeit an acceptance, but an acceptance of *a bill of exchange*.

Verdict, Not Guilty.

Under stat. 7 *G. 4. c. 64. s. 22.*, the court may, in cases of felony, allow the costs of the prosecutor and witnesses, though they are not under recognizances.

The prisoner had been apprehended by a Bench warrant, and the prosecutor was under no recognizance to prosecute. None of the witnesses were under recognizance, but one of them had been

Under stat. 7 *G. 4. c. 64. s. 22.*, the court may, in cases of felony, allow the costs of the prosecutor and witnesses, though they are not under recognizances.

subpœnaed. — On *Temple's* moving for the costs of the prosecution,

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REGINA

v.

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PARKE B. at first thought that he could only grant the costs of the witness who had been subpœnaed, but said he would consider the point; and on the following day his Lordship said, that on comparing the words of the 7 *Geo. 4. c. 64. s. 22.* (relating to felonies), with those of the subsequent section (relating to misdemeanors), it appeared to him that the Court had authority, in prosecutions for the former class of offences, to award the prosecutor his costs, even though he is not under any recognizance; and his Lordship accordingly granted the costs of the prosecution generally, including the witnesses.

S. Temple for the prosecution.

Grainger for the prisoner.

YORK.

Coram ALDERSON B.

REGINA v. LAW.

March 14.

INDICTMENT for housebreaking, and stealing money therein, against the form of the statute.

The case for the prosecution being closed, the counsel for the prisoner submitted, that the indictment ought to have concluded *contra formam statutorum*. They said, that the prisoner was in fact proceeded against under two distinct statutes, the

Objections to an indictment, which are within 7 *G. 4. c. 64. ss. 20, 21.*, must be taken by demurrer. It is too late to take them on the trial.

1839.

 REGINA
 v.
 LAW.

offence being committed contrary to the stat. 7 & 8 Geo. 4. c. 29. s. 12.; and the punishment provided by a subsequent statute (3 & 4 W. 4. c. 44. s. 2.).

Baines and Walker for the prosecution.

The defect, if it be one, is cured by statute 7 Geo. 4. c. 64. s. 20.; if there be any thing in the objection, therefore, it should have been raised by demurrer.

Ashmore, amicus curiæ, said, that *Parke* B. had, at a former assize for this county, ruled, that no advantage can be taken of any defect cured by the 20th and 21st sections of the stat. 7 Geo. 4. c. 64. except by demurrer.

ALDERSON B. I am clearly of that opinion, and am glad to find it confirmed by the authority of my brother *Parke*. The object of the legislature, as it is stated in the preamble, was to discourage “technical niceties, which intercept the punishment of offenders.” Here, this objection is indeed taken before verdict; but still too late, for it should have been taken by demurrer; and, even if it had been taken then, I should have recommended the grand jury to add the letter “s” to the word “statute.”

Objection overruled.

The prisoners were found

Guilty.

Baines and Walker for the prosecution.

Sir Gregory Lewin and Dundas for the prisoner.

1839.



REGINA v. JOHN BRIGGS.

YORK,
March 14.

THE prisoner was indicted for the robbery of one *Orlando Sladden*.

The defence set up was an *alibi*; and, in order to shew that the prisoner was near the place of the robbery at the time when it was committed, the prosecutor's counsel called one *Makinson*, who had been accosted by the prisoner on the road very shortly before the prosecutor was robbed. It appeared on the depositions that *Makinson* had in fact been also robbed by the party who so accosted him; but the learned counsel for the prosecution abstained from examining him on that point, or as to the manner in which he had been accosted, until *ALDERSON B.* interposed and said, there was no reason whatever why the whole circumstances, under which the witness had met the prisoner, should not be gone into.

In answer to an *alibi* set up on a trial for felony, the prosecutor may show the circumstances under which the prisoner was seen near the spot in question, though those circumstances involve the commission of another felony by him.

The witness was thereupon accordingly examined as to that matter, and deposed that the prisoner, at the time when he was met by the witness on the road, committed a robbery on him.

The *alibi* was, however, satisfactorily established.

Verdict, Not Guilty.

Hildyard and *Wortley* for the prosecution.

Baines for the prisoner.

1839.

Culverson v. Melton.
12. Feb. & Ill. 753.
 YORK,
 March 18.

Coram PARKE B.

CULVERSON v. MELTON.

An act of parliament, establishing a local court, enacted that the mesne process might be served on the defendant either personally, or by leaving the same at the dwelling-house, lodging, or place of abode, &c. of the defendant. Held, that it was sufficient to leave the process at a lodging where the wife of the defendant was living, though the defendant himself, a seafaring man, was absent on a voyage, and had been so absent for six months. The act provided that the defendant, in any action commenced for anything done in pursuance

TRESPASS for breaking and entering certain apartments of the plaintiff, situate at *Hull*, being the first floor of a certain dwelling-house there, and seizing the goods and chattels of the plaintiff therein, and converting the same to the defendant's own use.

Plea, General issue (by statute).

The defendant's case was, that the alleged trespass had been committed by him in execution of a judgment against the plaintiff, pronounced by the *Court of Requests* for the town of *Hull*, under certain local acts (2 *Geo. 3. c. 38.* and 48 *Geo. 3. c. 109.*); and a question arose whether the mesne process had been so served as to give that court jurisdiction.

By the 5th section of the first mentioned act (2 *Geo. 3. c. 38.*), it was enacted, "That from and after the passing of that act, it should and might be lawful to and for any person, &c. who then had or thereafter should have any debt or debts under the value of 40s. due or owing or belonging unto him, by or from any other person, &c. inhabiting or residing within the said town of *Kingston-upon-Hull*, to apply to the clerk of the court for the time being, or his deputy, who of the act, or on account of any order, &c. of the court, might give the special matter in evidence, under the general issue. Held, that this enactment protected, not merely the officers of the local court, but also the plaintiff in the suit there, who had voluntarily accompanied and aided the officer in seizing the goods of his debtor, under an order of execution.

should immediately make out and deliver to the serjeant of the said court for the time being a summons in writing, under his hand, &c. expressing the sum demanded, &c., and requiring him to appear, &c.; and the serjeant of the said court should forthwith cause such summons to be served on such debtor or debtors, either personally, *or by leaving the same at the dwelling-house, lodging, place of abode, shop, shed, stall, stand, or other place of dealing or trading of such debtor or debtors*, being within the limits of the said town, or with his, her, or their servant, or other person belonging to him, her, or them." By section 6th it was further enacted, that if such debtor or debtors, who should have been duly summoned as aforesaid, should not appear before such court at the time and place mentioned in the said summons, then it should and might be lawful to and for the Commissioners therein mentioned, or any three, &c., after due proof made upon oath of the service of the said summons in manner aforesaid, to hear the cause on the part of the plaintiff, or plaintiffs only, and to make such order, decree, or judgment, and to award reasonable costs of suit, as to them should seem most agreeable to equity and good conscience. And by the 8th section it was further enacted, that in any case where the said Commissioners, or any three, &c., should have made any order or decree for the payment of money, it should and might be lawful to and for the said Commissioners, or any three, &c. or more of them, to award execution either against the body or goods of the party, &c.

By the subsequent act (48 Geo. 3. c. 109.) the

1859. "
CULVERSON
v.
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jurisdiction of the court was extended to debts not exceeding 5*l.*; and by section 8. of that act it was enacted, that it should be lawful for any person having any debt not exceeding 5*l.* due or owing to him by or from any other person or persons whomsoever, inhabiting, residing, or being within the said town of *Kingston-upon-Hull*, or keeping and using any house, warehouse, wharf, quay, lodging, shop, shed, stall, or stand, or generally using and frequenting the markets there as a dealer, or seeking a livelihood, or sailing or navigating to and from the said port, to apply to the clerk of the said court for the time being, or his deputy, who should immediately make out and deliver to the serjeant of the said court for the time being a summons in writing, &c., which should be forthwith served on such debtor in the manner prescribed by the said recited act (2 *Geo. 3. c. 38.*); and upon due proof made of the service of such summons, the Commissioners present in court were empowered and required to make due inquiry concerning such demands or complaints, and make such orders, &c. as to them should seem meet, and most agreeable to equity and good conscience.

And by section 22. no action was to be commenced against any person for any thing done in pursuance of the said recited act, or on account of any order, determination, judgment, or decree of the said Commissioners, until twenty-one days notice, &c. And the defendant in every such action might plead the general issue, and give that act and the special matter in evidence.

It appeared that the plaintiff was a seafaring man, employed in the merchants' service, and that

in *April*, 1838, he left *England* on a voyage to the *East Indies*. For upwards of a twelvemonth before he so left *England*, he had been living with his wife in the apartments mentioned in the declaration, and which were within the limits of the jurisdiction given by the acts, and his wife continued to reside there after he so left *England*, until and at the time of the seizure of the goods now complained of. In *October*, 1838, a sum of *3l. 19s. 2d.* was owing to the defendant for goods, which he had supplied to the plaintiff's wife at those apartments, at various periods during her residence there, the plaintiff himself having also been resident there during part of the time. On the 13th of *October*, the defendant obtained a summons (in the form pointed out by the 5th section of the act 2 *Geo. 3. c. 38.*) from the Court of Requests, directed to the plaintiff, and calling upon him to appear on the 17th of *October*. This summons was served by the serjeant of the court on the plaintiff's wife in the before-mentioned apartments, the plaintiff himself being absent on the voyage to the *East Indies*. The present defendant appeared before the Commissioners on the 17th; and, the plaintiff not appearing, the Commissioners, on proof of the debt, made an order for payment of it by him, with 8s. costs, by monthly instalments of 5s.; and that, on failure of payment of any one of such instalments, the clerk of the court should forthwith make out execution against the plaintiff for all that might remain due. On 28th *November*, no payment having been made, the defendant applied again to the court, and obtained

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And by section 22. no action was to be commenced against any person for any thing done in pursuance of the said recited act, or on account of any order, determination, judgment, or decree of the said Commissioners, until twenty-one days notice, &c. And the defendant in every such action might plead the general issue, and give that act and the special matter in evidence.

It appeared that the plaintiff was a seafaring man, employed in the merchants' service, and that

in *April*, 1838, he left *England* on a voyage to the *East Indies*. For upwards of a twelvemonth before he so left *England*, he had been living with his wife in the apartments mentioned in the declaration, and which were within the limits of the jurisdiction given by the acts, and his wife continued to reside there after he so left *England*, until and at the time of the seizure of the goods now complained of. In *October*, 1838, a sum of *3l. 19s. 2d.* was owing to the defendant for goods, which he had supplied to the plaintiff's wife at those apartments, at various periods during her residence there, the plaintiff himself having also been resident there during part of the time. On the 13th of *October*, the defendant obtained a summons (in the form pointed out by the 5th section of the act 2 *Geo. 3. c. 38.*) from the Court of Requests, directed to the plaintiff, and calling upon him to appear on the 17th of *October*. This summons was served by the serjeant of the court on the plaintiff's wife in the before-mentioned apartments, the plaintiff himself being absent on the voyage to the *East Indies*. The present defendant appeared before the Commissioners on the 17th; and, the plaintiff not appearing, the Commissioners, on proof of the debt, made an order for payment of it by him, with 8*s.* costs, by monthly instalments of 5*s.*; and that, on failure of payment of any one of such instalments, the clerk of the court should forthwith make out execution against the plaintiff for all that might remain due. On 28th *November*, no payment having been made, the defendant applied again to the court, and obtained

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an order for execution, directed to the Serjeant at Mace, under which the serjeant, attended by the defendant in person, seized and sold the goods in the declaration.

Under these circumstances, it was contended for the plaintiff that the summons had never been duly served, and that therefore (the plaintiff having never appeared to it) the Court had no jurisdiction, so as to proceed against the plaintiff in his absence; and it was argued that the legislature, in enabling the party to serve the summons by leaving it at the "dwelling-house" of the debtor, must at least have intended the house at which the debtor is, for the time being, *dwelling*. Here it is proved that the plaintiff had been six months absent from it, under circumstances which preclude the possibility of his having any notice of this demand, or any means of defending himself against it; and it was further contended, that the 22d section of the act (48 Geo. 3.) did not enable the present defendant to give his defence in evidence under the general issue, that enactment being intended to protect the Commissioners and the officers of the Court acting in obedience to its process, but not parties who voluntarily interpose.

PARKE B. It appears to me that there has been a sufficient service of the summons; personal service is clearly not required; service at the dwelling-house is all that is required. The act expressly gives the Court jurisdiction over a class of persons not likely to be permanently resident within the town; and if the process be left at the house where, in their absence, the family continue

to reside, the terms of the act seem to me sufficiently complied with. I think also there is nothing in the other objection; it seems to me that this action, brought against the defendant for the part he took in carrying the process of the Court into execution, is an action brought against him "on account of an order, determination, judgment, or decree of the Commissioners," and if so, he is entitled to give the special matter of his defence in evidence under the general issue.

Nonsuit.

Cresswell and Tomlinson for the plaintiff.

Baines and Hildyard for the defendant.

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v.
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WHITELOCK v. HUTCHINSON.

YORK,
March 19.

ACTION on the case for depasturing a certain common, upon which the plaintiff had a right of common, by means of which the plaintiff was obstructed in the enjoyment of his said right.

Plea : That defendant was seised of a tenement, and in right thereof was entitled to right of common over the *locus in quo* for all his commonable cattle levant and couchant on that tenement, as appurtenant thereto.

Replication : That the defendant at the said times when, &c. depastured the common with cattle, which were *not* levant and couchant upon the tenement.

A right of common for cattle "*levant and couchant*," upon enclosed land, extends to such cattle as the winter eatage of the land, together with the produce of it during the summer, is capable of maintaining.

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It was proved that the cattle belonged to the defendant, and the principal question was, whether he put more of them upon the common than were properly levant and couchant upon the tenement; upon this point there was conflicting evidence. The defendant further gave evidence that the plaintiff had himself overstocked the common. A question as to the import of the term "levancy and couchancy" having been raised and discussed in the course of the trial,

PARKE B., in summing up the case to the jury, said, Amongst the older authorities there appears, certainly, some difference of opinion as to the meaning of the expression "levant and couchant." There is one set of cases in which it is laid down, that the term "cattle levant and couchant upon enclosed land" means such cattle as are actually used for the purpose of manuring and cultivating the enclosed land. (a) The rule now is, that such cattle only are to be holden levant and couchant upon the enclosed land, as that land will keep during the winter. (b) It has been argued, that the rule includes such as the land will keep during the whole, or any part, of the year; but that is not so. The real question is, has this defendant turned more cattle upon the common than the winter eatage of his ancient tenement, together with the hay and other produce obtained

(a) *Id est*, where a right of common *appendant* is claimed, that right being confined to arable land. See the judgment of Mr. J. Bayley, in *Cheesman v. Hardman*. (1 B. & Ald. 710, 711.)

(b) 1 Saund. 28 b. n.

from it during the summer, is capable of maintaining? If you think he has, your verdict must be for the plaintiff; and whether the plaintiff has himself also overstocked the common, is wholly immaterial on this record,

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 v.
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Verdict for the plaintiff.

Cresswell and Watson for the plaintiff.

Wightman for the defendant.

Coram ALDERSON B.

REGINA v. FRANCIS FRANCE.

YORK,
 March 19.

INDICTMENT for forgery.

The indictment charged that the prisoner forged the acceptance of one *John Winter* to a bill of exchange, and uttered the same, knowing it to be forged, with intent to defraud one *George Laycock*.

Winter, in his examination before the magistrates, had stated, that the acceptance was not his handwriting, and that he had never given the prisoner authority to accept for him. In his cross-examination by the prisoner's attorney, he admitted he had had some transactions in accom-

The depositions taken before the magistrates against a prisoner cannot be read against him, where the witness has died since the examination, unless the depositions in cross-examination have been correctly taken, and returned to the court. Depositions taken in cross-exam-

ination, at a subsequent time to those in chief, and not signed by the committing magistrates, are so irregular as to prevent the whole depositions from being read against a prisoner; and this, although both are proved by one of the committing magistrates to have been accurately taken.

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v.

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modation bills with the prisoner, but persisted in denying that he had ever authorised the prisoner to put his name either to this bill or any other.

Between the period of his examination before the magistrates and the present trial *Winter* died.

The magistrates' clerk proved *Winter's* examination to have been duly taken in the prisoner's presence; and that the prisoner's attorney had attended and cross-examined him.

On the examination of *Winter* being tendered in evidence by the prosecutor, it was discovered, that though the examination itself was duly signed by the two magistrates, the cross-examination, which had been taken on a subsequent day, was not signed by the magistrates at the foot of it: but the examination of two other witnesses on the prisoner's behalf (which had been taken at the same time with the cross-examination of *Winter*) were pinned up along with it, and the last sheet of the whole was signed by the two magistrates.

ALDERSON B. expressing doubt whether, under these circumstances, the examination could be read against the prisoner.

It was contended on the part of the prosecution, that the provision as to the magistrates' signature was merely directory, like that which required the magistrates to return the examinations "before or at the opening of the Court." The provision as to their signing the examinations formed part of the same clause which required them so to return the examinations (7 *Geo. 4. c. 64. s. 2.*), and that latter provision had been ruled to be merely directory.

ALDERSON B. (after consulting PARKE B.) said, that if the magistrates' clerk could state that the sheets were all pinned together at the time the magistrates signed the last sheet, he thought he could not reject the examination of *Winter*, but must receive the whole in evidence.

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The magistrates' clerk could not recollect how this was; and one of the committing magistrates, happening to be present in court, was examined, and stated that the depositions of the witnesses were all accurately taken; and that, when he signed them, all the sheets were lying on the table, but he could not state that they were pinned together.

ALDERSON B. upon this rejected both the examination and the cross-examination.

The whole of the examinations and cross-examinations before the magistrates were, however, at a subsequent period of the trial, read at the instance of the prisoner.

Verdict, Guilty.

Baines and *Walker* for the prosecution.

The prisoner was undefended.

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YORK,
March 21.

SCHOLEFIELD v. ROBB.

Crib-biting, which has not yet produced disease, or alteration of structure, is not an "unsoundness," but is a "vice," under a warranty that a horse is "sound" and free from "vice."

ASSUMPSIT on the warranty of a horse, "that it was sound and free from vice." 1st breach, that it was not sound. 2d, that it was not free from vice.

Pleas. 1. *Non assumpsit*. 2. (to 1st breach), that the horse was sound. 3. (to 2d breach), that it was free from vice.

The horse was bought to be delivered at a future day, and the case of the plaintiff was, that the horse was a *crib-biter* and *wind-sucker*. Veterinary surgeons were examined, who said that the habit of crib-biting was injurious to horses; that the air sucked into the stomach of the animal distended it, and impaired its powers of digestion, occasionally to such an extent as greatly to diminish the value of the horse, and render it incapable of work. Some of the witnesses gave it as their opinion that crib-biting was an unsoundness; it was not, however, shewn, that in the present instance the habit of crib-biting had brought on any disease, or (as yet) interfered with the power or usefulness of the horse. The defendant denied that the horse was shewn to be a crib-biter at all at the time of the sale, though there was evidence of his being one at the time of the delivery.

PARKE B. told the jury, that if they thought the horse, at the time of its being sold, and of the warranty being given, was not a crib-biter, their

verdict on both the last issues must be for the defendant; but, even if the evidence of the plaintiff satisfied them that the horse was a crib-biter at the time of the warranty, such evidence would not, in his opinion, support the allegation that it was then unsound, so as to entitle the plaintiff to a verdict on the second plea. To constitute unsoundness there must either be some alteration in the structure of the animal, whereby it is rendered less able to perform its work, or else there must be some disease. (a) Here neither of those facts had been shewn. If, however, the jury thought that at the time of the warranty the horse had contracted the habit of crib-biting, he thought that was a "vice," and that the plaintiff would be entitled to a verdict on the third plea. The habit complained of might not, indeed, like some others (for instance, that of kicking), shew vice in the temper of the animal; but it was proved to be a habit decidedly injurious to its health, and tending to impair its usefulness, and came, therefore, in his Lordship's opinion, within the meaning of the term "vice," as used on such occasions as the present.

Verdict for the plaintiff on the general issue; but for the defendant on the two other issues. (b)

Cresswell and Knowles for the plaintiff.
Alexander and Hoggins for the defendant.

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ROBB.

(a) *Coates v. Stephens*, *suprà*, p. 157.

(b) *Broennenburgh v. Haycock*, Holt, N. P. C. 680.

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LANCASTER.

Coram PARKE B.

March 26.

REGINA v. WALKER.

On a trial for rape, or attempt to commit a rape, the female assaulted may be confirmed by proof that she recently after the alleged outrage made a complaint, but the particulars of what she said cannot be asked in chief of the confirming witness, but may in cross-examination.

INDICTMENT for an assault with an intent to commit a rape.

It was proved that the prosecutrix, immediately after the alleged assault, made a complaint to a female relation, then in the house, of the treatment she had received from the prisoner. The relation was called, and was proceeding to state the particulars of the complaint so made by the prosecutrix, when the prisoner's counsel interposed.

PARKE B. The sense of the thing certainly is, that the jury should, in the first instance, know the nature of the complaint made by the prosecutrix, and all that she then said. But, for reasons which I never could understand, the usage has obtained that the prosecutrix's counsel should only inquire, generally, whether a complaint was made by the prosecutrix of the prisoner's conduct towards her, leaving the counsel of the latter to bring before the jury the particulars of that complaint by cross-examination.

The witness was accordingly only permitted to prove generally that the prosecutrix complained to

her of the ill treatment she had experienced from the prisoner.

Verdict, Not Guilty.

Dundas and *Segur* for the prosecution.
Brandt and *Baines* for the prisoner.

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REGINA
v.
WALKER.

Coram PARKE B.

REGINA v. MARY ANN RYAN.

LIVERPOOL,
April 3.

THE indictment charged the prisoner with causing poison to be taken by one *George Power*, with intent to murder the said *George Power*. The evidence shewed that the prisoner's intention was to murder one *Catherine Power*, the mother of *George Power*, but that the latter had accidentally swallowed the poison.

The prisoner was found guilty.

PARKE B. afterwards said he had spoken to ALDERSON B. on the subject, and that they both much doubted whether the verdict could be supported, the averment of the intention not being proved as laid. He was aware that there was a case where, under the old law (9 Geo: 4. c. 31. s. 11.), a conviction had taken place, though there was a similar defect in the evidence (a), but he doubted

An indictment for causing poison to be taken by A. B., with intent to murder A. B., is not sustained by evidence showing that the poison, although taken by A. B., was intended for another person.

(a) See R. v. Lewis, 6 Carr. and P. 161.

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the propriety of that decision ; and, to provide for any such case, the language of the new statute under which the prisoner was tried (1 *Vict. c. 85. s. 2.*) had been altered ; for under that section it was sufficient to allege that the prisoner did the act, "*with intent to commit murder,*" generally. The prosecutor had here unnecessarily described the intention more particularly than he need have done, but, having so described it, it appeared to the learned Baron that the prosecutor was bound to prove the intention as laid. His Lordship therefore desired a fresh indictment to be prepared, alleging the intent to have been "to commit murder" generally, under which the prisoner was tried and convicted, and sentenced to be transported for life.

Coram PARKS B.

Reg. v. Rogers. Port. 479.

LIVERPOOL,
April 6.]

REGINA v. TURNER.

An indictment beginning "The jurors of our Lady the Queen" is not bad in arrest of judgment. The words "of our Lady the Queen" may be rejected as surplusage, the jurors intended being those mentioned in the caption.

THE prisoner had been convicted of a riot with intent to obstruct the carrying into execution the provisions of the act for the amendment of the law relating to the poor.

The indictment commenced, "The jurors of our Lady the Queen, upon their oath present, &c."

Dundas now moved in arrest of judgment. He contended that the presentment should have been by the jurors "*for*" the Queen. There are not any persons recognized by the law as the jurors "*of*" the Queen, but the meaning of those in-

troductory words is, that the jurors are at the time inquiring for the Queen, and so make the presentment. He cited 4 *Hawk. P. C.* book 2. c. 25. s. 126. to shew that indictments had been quashed for this defect: "also many indictments in such "(i. e. inferior) courts have been quashed for want "of the words *jurat' et onerat'* in the caption; "also for want of the words *ad tunc et ibidem* "before the words *jurat' et onerat'* and also "for want of the words *ad inquirend. pro dicto* "*Domino Rege.*" Again, in 2 *Hale, P. C.* p. 165. 167. the form given is the same, "*jurat' et onerat'* ad inquirendum pro Domino Rege." If the words pro Dominâ Regina could be considered as only part of the caption, perhaps it might be amended; but they form the commencement of the indictment itself, as appears from Lord *Hale* (2d vol. 165.). It is indispensable to shew that the jurors are acting for the King; that is as necessary for the purpose of founding the jurisdiction of the Court, as the allegation that they are acting for the body of the county: and this latter averment is clearly necessary. (*Starkie's Crim. Pl.* 234.)

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TURNER.

Wightman, contra. It may be contended that the words "of" and "for" are, in this passage, synonymous. But the better answer to the objection which has been taken is, that the words "of our Lady the Queen" may be rejected altogether, and yet the indictment remain good. It is said, and may be admitted, that the indictment must be found by jurors acting for the *body of the county*, yet even that averment not only is not indispensable, but in practice is never found inserted in

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 TURNER.

the indictment. Properly speaking, the caption indeed contains all these requisites ; but there is but one caption to all the indictments found at the assize, the form of which caption is given in *Hale* (*P. C.* 2d vol. 165.), and the several indictments impliedly refer to the matters in that general caption. On the same principle that an indictment is good, though it be not expressly stated on the face of it that it is the presentment of jurors sworn to inquire for the body of the county, so may it be good, though it be not expressly stated that the jurors are acting for the Queen. He referred to 1 *Chitty, Crim. Law*, p. 327. as containing the authorities on the subject.

Dundas, in reply, relied on the uniform language of the precedents, from which the present indictment departed, and contended that the persons by whom the indictment purported to be presented (jurors of the Queen), were persons unknown in law.

PARKE B. There is no doubt that the indictment in this case departs, in the particular pointed out, from the common form ; it seems to me, however, that the words complained of, “ of our Lady the Queen,” are not material, and might have been altogether omitted ; and, if so, the insertion of them cannot vitiate the indictment. The expression usually found in indictments, that “ the jurors for our Lord the King present, &c.,” does not mean that a particular class or description of jurors so present, but only that the jurors present for the King — it is sufficient that it here appears that the

matters are presented by the jurors (*id est*, the jurors spoken of in the caption), and that the matters presented are the proper subject of indictment by those jurors ; and it seems, indeed, that in former times the caption concluded, " It is presented that A. B. &c. did so and so," without any further mention of the jurors. If it be thought that there is any weight in the objection, the prisoner may bring a writ of error, but I cannot properly arrest the judgment, unless I think the indictment clearly bad ; on the contrary, I am inclined to think the indictment sufficient, and the motion must therefore be refused.

The prisoner was sentenced to imprisonment.

Wightman for the prosecution.

Dundas for the prisoner.

Coram ALDERSON B.

RIDGWAY v. EWBANK.

April 9.

ASSUMPSIT on a charterparty for not loading a sufficient cargo on board the ship "*Coromandel*."

1st Plea, That the defendant did load a complete cargo pursuant to the charterparty, and issue thereon.

2d Plea, That the defendant loaded part of the cargo, to wit 540 tons, &c., and was ready to have loaded the residue on board, whereof the plaintiff's agents had notice, but that they refused to receive the same.

Replication, *De injuriâ*, &c.

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v.
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On issues joined in an action on a charterparty, "that the defendant did furnish sufficient cargo," and "that plaintiffs refused, after notice, to receive the cargo offered," the plaintiff is entitled to begin.

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EWBANK.

W. H. Watson, for the defendant, claimed the right to begin. The affirmative of both issues is on the defendant; he undertakes to shew that he *did* perform his part of the contract, but that the plaintiff's agents made default. Again, to apply another test, supposing no evidence to be given on either side, the plaintiff would be entitled to a verdict; that shews that the *onus probandi* lies on the defendant; and he said that the Lord Chief Justice had recently so ruled at Guildhall, in an action for improper stowage of a cargo, where the defendant had pleaded that the cargo was properly stowed.

ALDERSON B. It matters not, in the least, on which party the affirmative may *in terms* lie: the question is, on whom it lies in substance? and the test you refer to is the true one, but it makes against you: who would succeed if no evidence were given on either side? Why, the defendant. It is necessarily part of the plaintiff's case that the defendant would not supply a sufficient cargo: he has introduced an averment in his declaration to that effect, without which, indeed, it would have been bad; and it lies upon him to produce evidence to support that averment. He is therefore the party to begin.

The plaintiff accordingly began.

Verdict for the plaintiff. (a)

(a) See *Hoggett v. Oxley*, post.

Cresswell, Alexander, and J. L. Adolphus for
the plaintiff.

Watson and Warren for the defendant.

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v.
EWBANK.

A motion was afterwards made for a new trial,
on a point of law which arose in the course of the
trial, which motion is still pending.

WESTERN CIRCUIT.

BODMIN.

Coram MAULE B.

REGINA v. JOHN GERRISH and ELIZA-
BETH BROWN.

BODMIN,
March 30.

THE prisoners were indicted for passing a coun-
terfeit half crown, they at the same time having
in their possession other counterfeit coin, know-
ing the same to be counterfeit, under 2 W. 4.
c. 34. s. 7.

It was proved that the female prisoner, in the
presence of and in concert with the other prisoner,
passed a bad half crown, and that shortly after-
wards they were taken into custody together, and
searched, when on the female prisoner was found
only good money, which had been just taken in

Where one of
two persons in
company ut-
ters counter-
feit coin, and
other counter-
feit coin is
found on the
other person,
they are joint-
ly guilty of the
aggravated
offence, under
2 W. 4. c. 34.
s. 7.; if acting
in concert,
and both
knowing of the
possession.

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change for the bad half crown, and on the person of *Gerrish* was found a bag containing nine other bad half crowns, apparently made from the same mould as that passed by the prisoners.

MAULE B., after looking at the clause in the statute, interposed and said, that it would seem that the interpretation clause, sect. 21., limited the custody or possession to mere personal possession, which could not be predicated of two persons.

Moody said, that the point had recently been argued in a case on the same statute from the Northern Circuit, at a meeting of the Judges, at which Mr. Baron *Gurney* was present, but the decision was not yet promulgated. *R. v. Rogers*, Hilary Term, 1839.

MAULE B., after consulting Mr. Baron GURNEY, said that in that case the two prisoners were indicted for a substantive offence, in having bad coin in their possession, on the 8th section of the act, and that the Judges had decided that coin found on one was in the joint possession of the two, if they had the common intent of uttering, and were both cognisant of the possession; and that case governed the present.

The facts were left to the jury to say how far the possession was brought home to the knowledge of both.

The jury convicted both prisoners of uttering only.

Moody and *Damon* for the prosecution.
The prisoners were undefended.

CASES
ARGUED AND DECIDED
AT NISI PRIUS
IN THE COURT OF EXCHEQUER,
AT THE SITTINGS IN AND AFTER
TRINITY TERM,
3 VICT.

EXCHEQUER.
SITTINGS IN TERM.

Rule v. Lambert
18 Lj 1.

Hood v. Barrington
6 Lj 218. 1839.

JACOB v. KIRK.

June 5.
Smith v. Handman.
5 Man. & Gr. 344.
A memorandum of sale of goods in the vendor's book, signed by the vendee in initials, the vendor's name not appearing
L.C. 19.
6 P. 73.

THIS was an action of assumpsit for goods bargained and sold. There was also a count on an account stated.

1st Plea, *Non assumpsit* ; 2d, No note in writing to satisfy the Statute of Frauds, and issue thereon.

in the book, is not a sufficient note in writing to satisfy the Statute of Frauds ; nor will the defect be cured by a letter from the vendee, in which the vendor's name does appear, unless the letter clearly refers to the memorandum.

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v.
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It was proved that the plaintiff travelled over the country selling cigars, and that on the 3d *July*, 1838, the defendant ordered of him about 14 lbs. of cigars of different qualities. It was also proved that, at the time of the order being given, the plaintiff had not the cigars in his possession, but that it was his habit, after having obtained the orders, to send them from a wholesale dealer in *London*.

In order to satisfy the Statute of Frauds, the plaintiff produced a memorandum book, containing, amongst other notes and orders, the following pencil entry: "Mr. *Kirk*, 6 doz. King's, 6 doz. Queen's, at 25s. per lb. ; 2 doz. others at 20s. per lb. ; to *Russell Street, Manchester*. Signed R. K.;" which signature was proved to be in the defendant's handwriting.

The plaintiff's name no where appeared in the book ; nor was there any other evidence to connect the plaintiff with the order so entered, save a letter from the defendant in the month of *August* following, addressed to the plaintiff, stating that he had received a letter from the plaintiff, "that he was surprised at the plaintiff's expecting him to accept the cigars, which, instead of having been sent in nine or ten days, had not arrived in *Manchester* till the 10th of *August* ;" that he therefore should not think of accepting them, and referred him to his solicitor. But the letter did not refer to the entry in the above book. This being the plaintiff's case,

Erle, for the defendant, submitted that the plaintiff must be nonsuited. The count for goods bargained and sold was not supported by the evidence,

but the declaration should have been on a special count for not accepting, and to that count the Statute of Frauds would afford a sufficient defence. It is clear on the authorities, that the memorandum to satisfy the statute must contain the names of the parties (the vendor and vendee), and the other terms of the contract. Here is no *vendor's* name—for there is nothing to connect the pencil entry in the memorandum book with the defendant's letter of *August*: he cited *Champion v. Plummer*, 1 N. R. 252., to shew that the connection between the two documents must be collected from within the four corners of the instruments themselves; citing also *Richards v. Porter*, 6 B. & C. 438.; *Cooper v. Smith*, 15 East, 103.; *Levy v. Acebal*, 10 Bing. 376.

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JACOB
v.
KIRK.

Platt and Martin, contra. The first count is sustainable; but if not, the declaration might be amended by turning it into a special count for not accepting. With respect to the Statute of Frauds, the memorandum and letter were sufficiently connected, no other contract having been suggested as existing between the plaintiff and defendant, to which the letter could possibly have reference.

PARKE B. My opinion is, that the first count is not made out, as there was not here a bargain for any specific ascertained chattels; but with respect to the application for an amendment, I must say, I am disposed to open the door for amendments as wide as possible. By allowing the amendment here, and so giving the plaintiff an opportunity of bringing forward his real cause of action, I consider I shall be meeting the justice of the case;

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but of course the defendant must have time for pleading *de novo*, and the plaintiff must pay the costs of the day, and of the amendment. I should greatly doubt, however, whether it will be worth while for the plaintiff to avail himself of these terms; for I am of opinion that he cannot get over the objection under the Statute of Frauds. My opinion is, that the letter ought clearly to refer to the pencil memorandum; and that the whole mischief intended to be guarded against by the statute would be incurred, if verbal evidence were admitted to shew that the documents must necessarily be presumed to refer to each other.

The plaintiff's counsel, notwithstanding this intimation of the learned Baron's opinion, requested to have the amendment made, and *Erle*, for the defendant, thereupon elected to plead forthwith; which being done, the defendant obtained a verdict on the ground that the cigars had not been sent within a reasonable time, as averred in the amended count; and under the direction of the learned Baron, the defendant took a verdict also on the plea of the Statute of Frauds.

Verdict for the defendant.

Platt and *Martin* for the plaintiff.
Erle for the defendant.

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SITTINGS AFTER TERM.

MARKS v. BENJAMIN.

GUILDHALL,
June 25.

DEBT for a penalty of 100*l.*, under stat. 25 *G. 2.* c. 36. s. 2., for keeping a disorderly house.

On this case being called on, the plaintiff appeared in person, and stated to the Lord Chief Baron that he did not wish to prosecute the action further. He said he had commenced the action under a mistake, and was now desirous of being nonsuited; whereupon

Kelly interposed, and stated that the plaintiff had duly retained an attorney to conduct the action for him, under whose instructions he, the learned counsel, now appeared; and that it was too late for the plaintiff now to come forward, and in this irregular way revoke the authority which he had so given, thereby depriving the attorney of his lien for costs on the judgment which he was in a situation to recover. This was a penal action, moreover, and the Court would not sanction what was evidently a compromise, fraudulently entered into to the prejudice of the attorney.

Where counsel, regularly retained, appear for the plaintiff in a penal action, and claim to proceed, the plaintiff himself cannot appear, and claim to be nonsuited. The use of rooms in a licensed victualler's house for private balls, and public balls, and masquerades, on the speculation of persons hiring the rooms for the occasion, does not render the landlord liable to the penalty under 25 *G. 2.* c. 36. s. 2.

Lord ABINGER C. B. I cannot listen to an application of this nature; the cause is here in Court, duly entered, and, being a penal action, I cannot interfere. The trial must proceed.

The jury were accordingly sworn, and the trial proceeded in the regular way.

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v.
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The facts of the case were, that the defendant was the occupier of a house called *Howard's Coffee House*, situate in the neighbourhood of *Aldgate*; he was duly licensed as a common victualler, but had no licence authorising him to keep a house for the purpose of music and dancing. It was proved that weekly public balls were held in the house, under the direction of a person styling himself "*Signor Israel Bellillo*, professor of dancing;" that, on these occasions, the professor's regular scholars were admitted *gratis*; but that any one else was admitted on paying the sum of one shilling, which was received by the professor; the defendant supplying, and deriving his share of the profit from, such refreshments as the company called for. The house was also used by members of the Jewish persuasion, for the purpose of holding charity balls there; and occasionally the humbler members of the same persuasion hired the rooms of the defendant, at so much per night, and had balls there for their own amusement.

There was no evidence that the house was not, in all particulars, respectably conducted.

On *Jervis's* rising to address the jury, and contending that the house was not proved to be a disorderly house, within the meaning of the act of parliament,

LORD ABINGER C. B. said, I am clearly of opinion that there is not any such proof. It is merely proved that one of the rooms in the defendant's house is frequently used for private parties, and public balls and masquerades, on the speculation of strangers. This is not suffi-

cient to shew that he "kept a house for the purpose of music and dancing," contrary to the statute. If such were held to be the effect of the statute, public balls held at the fashionable end of the town, and frequented by the higher classes of society, would also be illegal.

Verdict for the defendant. (a)

Kelly and *Humfrey* for the plaintiff.

Jervis for the defendant.

(a) At common law the plaintiff and defendant must in general have appeared in person, and could not have appeared by attorney without the king's special warrant by writ or letters patent (Co. Litt. 128 a., Fitz. N. B. 25.), though it seems that, having appeared in person, a party might appoint a *responsalis* to represent him in the subsequent progress of the action. (Steph. on Pleading, Ap. n. 5.) Some early statutes gave the subject a right to appear by attorney in certain cases; and the stat. of *Westm. 2.* (13 *Edw. 1.*) c. 10., which certainly conferred the right in much more general terms, is sometimes inaccurately spoken of as having conferred it in all cases: — the right seems, however, to rest upon that and divers other statutes, and upon the liberal construction of them, which has been silently acquiesced in. By the terms of the stat. of *Westm. 2.*, the attorney "shall have full power *till the plea be determined, or he be removed by his master.*" In regard to the suitor's right of countermanding an authority of this kind, once duly given and recorded, the courts have laid down certain rules, with a view to the protection, as well of the attorney himself, in regard to his costs, as also of the opposite party, who is entitled to deal with the attorney of his antagonist, as a party authorised to represent that antagonist, in the suit, until he has due notice of the authority being countermanded. And, accordingly, as the attorney himself, having once accepted the warrant, is not permitted afterwards, without due cause, to withdraw from the suit; so neither can the client revoke the warrant without a rule of court, or the order of a judge, followed up by notice to the other side. (Compl. Att. 292., cited by Lord C. B. Comyns, Attorney, B. 9.; and see Rules of Mich. T. 1654, K. B. s. 10., C. B. s. 13., Pract. Reg. 2. 4., Fitz. N. B. 27. n a.)

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These rules are not confined to the case of a party's *changing* his attorney, but are in their terms equally restrictive of his right to withdraw the warrant and appear in person: and it is obvious that, if a party were thus allowed to interpose without notice in any stage of the suit, and without any formal order of the court to take the conduct of the suit into his own hands, and revoke his attorney's authority, all the inconveniences intended to be guarded against would be liable to occur; the attorney might be defrauded of his costs, and the opposite party exposed to risk in having to determine which of the two he is to recognise as conducting the suit; the attorney, who claims still to be authorised; or the client, who denies that authority. *Lovegrove v. Dymond* (4 Taunt. 669.) can hardly be deemed an authority in favour of a party's having a right thus to interpose, and appear in person; it was there ruled by the court, apparently without discussion, that, where the plaintiff had obtained an order for changing his attorney, but had not served a copy of the order on the defendant, he was entitled to appear in person and shew cause against a rule obtained by the defendant for judgment as in case of a nonsuit. The court merely said, that the defendant himself, having called on the plaintiff to come in and shew cause, could not object to his appearance in that mode; adding, that the reason of the general rule is, that there may be some person whom the adverse party may look to; which reason did not apply there. That case may therefore be considered to rest upon its own special circumstances.

SUMMER ASSIZES, 3 Vict. 1839.

WESTERN CIRCUIT.
 DEVIZES.

DEVIZES,
 July 18.

REGINA v. BUTCHER and Others.

Counsel for
 prisoners in
 felony have no
 right to give
 the prisoners'

statement of the facts. A statement of facts not intended to be proved gives a reply to the counsel for the prosecution.

THE prisoners were indicted for maliciously shooting at *William Barlow*.

The facts were, that the prisoners, six in number, were, late at night, passing a police station in *Devizes*, where some of the metropolitan police were posted; *William Barlow*, one of the police, was stationed at a window, and it was alleged that, in passing, one of the prisoners fired a pistol at him.

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REGINA
v.
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Others.

For the defence, *Cockburn*, in his address to the jury, was proceeding to give the account received by him from the prisoners of what passed, for which he said he was compelled to rely on statement only, inasmuch as every one capable of explaining the transaction was included in the indictment.

COLERIDGE J. interposed, and said, I cannot allow counsel to make any statement of facts not intended to be proved, without giving a reply to the counsel for the prosecution. The same rule ought to prevail where counsel are defending prisoners as in civil cases; when, indeed, a prisoner is undefended, the Court are obliged to hear his whole statement, and the jury must make the best of it; but I have often insisted on the rule where counsel were employed, and it ought to be followed.

The prisoners were acquitted.

Hodges for the prosecution.

Cockburn, *Ball*, and *Stone* for the prisoners.

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 EXETER.

 Coram COLERIDGE J.

 EXETER,
 July 27.

OLIVER v. DOVATT.

A promise by the drawer to pay the indorsee and holder of bills overdue is evidence on an account stated, in an action by the indorsee against the drawer.

ASSUMPSIT by the indorsee of two foreign bills of exchange, for 50*l.* and 9*l.* respectively, against the drawer.

There was also a count upon an account stated, to which the only plea was *non assumpsit*. To the count on the bills there were several pleas traversing the drawing, indorsement, protest and notices, and consideration; and also a plea setting up the defence of usury.

The defendant was an officer of marines; and, on his ship touching at *Rio Janeiro*, had drawn the bills, payable to the order of *Traus* and *Moss*, merchants at that place, on Messrs. *Grant* and Co., *Portsmouth*. *Traus* and *Moss* indorsed the bills specially to the plaintiff, an agent of theirs, who resided at *Portsmouth*.

The bills were dishonoured; and, on the defendant arriving at *Portsmouth*, shortly after the dishonour of the bill last falling due, an agent of the plaintiff saw him, and shewed him the bills, and demanded payment. The defendant requested

that the bills might be held for some weeks longer, and said that they should be paid. There was great difficulty, on the plaintiff's part, in proving some of the requisites to support the counts on the bills, which were denied in the pleas; but it was contended that, at all events, the plaintiff was entitled to a verdict on the account stated.

For the defendant it was contended that, the action not being between the immediate parties to the bills, they could not be evidence of an account stated between them.

COLERIDGE J. told the jury that, properly speaking, it was a question for them whether, in fact, the defendant had promised the plaintiff to pay him the bills. If, knowing that he held the bills as indorsee, the defendant had promised payment, he was of opinion that their verdict ought to be for the plaintiff on the account stated.

Verdict for the plaintiff on the account stated, and on some of the issues on the counts for the bills.

Verdict for the defendant on some of the other issues. (a)

Erle and Butt for the plaintiff.

Bompas Serjt. and *Saunders* for the defendant.

(a) See *Highmore v. Primrose*, 5 M. & S. 65. But an acknowledgment of his liability made by the defendant to some other party to the bill, would not, it is presumed, support a count on an account stated between the plaintiff and defendant. (See *Breckon v. Smith*, 1 Ad. & Ell. 488.) It has also

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been recently held, that where the indorser of a bill told the holder, on the day of its falling due, that he knew it would not be paid by the acceptor, "and that he, the indorser, would send him (the holder) money, in part payment of the bill, on the following day," this did not support the count upon the account stated; for it afforded no evidence of any debt due before that time. (*Burgh v. Legge*, 5 Mees. & W. 418.)

CUDLIFF v. WALTERS and Another.

An appointment of an umpire by two arbitrators, under a power to appoint before "entering on the cause of the matters in difference," is good, though the arbitrators have, before such appointment, enlarged the time.

If one of the arbitrators insist upon producing further evidence, and the other refuse to allow it to be done, this is a sufficient "disagreement" between the arbitrators to authorise the interference of the umpire.

THIS was an action of covenant upon a deed of reference dated 28th *July* 1828, whereby the plaintiff and the defendants agreed to submit all matters in difference to the award final end and termination of *Richard Marrack* and *Henry Rawlings*, "or, in case they could not agree, to the award and umpirage of such person as they should, by writing to be thereon indorsed under their hands, before they entered on the cause of the matters in difference, appoint as umpire;" so that the award, &c. should be ready to be delivered on or before the 10th of *October* then next, with power to the arbitrators or umpire, by indorsement, from time to time to extend the time. The declaration alleged the appointment of the umpire before the arbitrators entered upon the cause of the matters in difference; that the arbitrators proceeded to hear the parties and their witnesses, and could not agree with each other concerning the premises, but, on the contrary, did

disagree; whereupon the umpire, having taken upon himself the umpirage, made his award, &c.

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The only pleas on which the verdict turned were, 1st, That the arbitrators did not duly nominate, constitute, or appoint the umpire in manner and form, &c.

2dly, That the arbitrators did not disagree concerning the said disputes and matters in difference in manner and form, &c.

It appeared in evidence that before the arbitrators met on the reference, a correspondence took place as to the time of proceeding, and an enlargement was indorsed on the deed, and signed by the arbitrators as follows: — “We, finding it inconvenient to proceed on this reference before the 22d day of *November*, do hereby enlarge the time till the 1st day of *January* next. — Dated the 16th day of *August*, 1838.”

On the 22d of *November* the arbitrators met; and, before proceeding on the reference, agreed on the umpire, and duly indorsed his appointment on the deed. The arbitrators then proceeded on the reference, and heard evidence for two days; and the attorneys of the parties addressed them, and concluded their case. On the 26th, the arbitrators again met, and could not agree on their decision; but one of them proposed that further evidence should be given for the defendants, and produced certain documents, which the other arbitrator refused to look at; and the umpire was thereupon applied to, by letter, to receive the further evidence. The umpire met the arbitrators, but refused to interfere unless they disagreed; upon

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which they each wrote down their opinions on certain points, which they declared to be unalterable ; but one of the arbitrators proposed that the further evidence might be received, as they might, perhaps, then agree. The points in difference being, in the opinion of the umpire, decisive, and essential to the merits of the case, he gave a written notice to the parties, stating the disagreement of the arbitrators, and requiring them to attend him, as umpire, on the 19th of *December*.


On that day the parties and their attorneys attended the umpire, as well as the arbitrators, one of whom proposed to interfere, but the umpire refused to allow him, and heard the parties, and made his award.

Crowder, for the defendant, contended that the appointment of the arbitrators, being made after the enlargement of the time, was invalid ; that the enlargement was an important act in the exercise of the discretion of the arbitrators, and was therefore an entering "on the cause of the matters in difference," within the meaning of the deed ; and that this being a submission by deed, the objection could not be waived by the mere attendance of the parties, which distinguished the present case from *In re Hick* (a), and *Matson v. Trower*. (b) Then as to the disagreement, the arbitrators had not finally disagreed. The umpire had no right to interfere until the arbitrators had exhausted all chances of agreeing. Here, the additional evidence might

(a) 8 Taunt. 694.

(b) Ry. & Moo. 17.

have produced an agreement ; and one of the arbitrators had never expressly assented to the umpire's interfering, but had throughout proposed having recourse to the additional evidence.

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COLERIDGE J., in summing up, said that he had no doubt of the appointment of the umpire being valid. That the object of this clause in agreements of reference was to insure the appointment of an umpire before the minds of the arbitrators became embarrassed by the discussion of the matters in difference ; and that the enlargement of the time being a mere arrangement for the common convenience of the arbitrators themselves, as well as of the parties concerned, could not be said to be an entering upon the cause of the matters in difference. In fact, the case in 8 *Taunton* was rather an authority for the plaintiff. With regard to the disagreement, it was matter for the jury to say whether there was such an essential difference between the arbitrators as entitled the umpire to interfere : no doubt it ought to be such a difference, after hearing the case, as rendered the agreement of the arbitrators hopeless. Here both parties were heard and closed the case, and one of the arbitrators chooses to get up further evidence, which the other refuses to hear : this is such an essential difference as justifies the interference of the umpire.

Verdict for the plaintiff.

Erle and Butt for the plaintiff.

Crowder for the defendant.

1839.

BODMIN.

Coram COLERIDGE J.

REGINA v. LOVELL.

Semble. — Larceny by a clerk in a public office under the crown is not within 7 & 8 G. 4. c. 29. s. 46. An indictment for embezzlement of moneys received by a clerk, whilst such, is good under the 2 W. 4. c. 4., without alleging the embezzling to have taken place whilst the prisoner was clerk.

THE prisoner was indicted in the first count for larceny, for that, being a clerk to her Majesty the Queen, he stole the moneys of her Majesty, under the 7 & 8 G. 4. c. 29. s. 46. There were other counts for simple larceny, stating the property in various ways; and the last three counts were for embezzlement, under 2 W. 4. c. 4. These counts charged that the prisoner being, at a certain time and place, a clerk employed in the public service of her Majesty, and by virtue of such employment entrusted with the receipt and custody of money, the property of her Majesty, did then and there receive into his possession, by virtue of such employment as such clerk, certain money, the property, &c., and did then and there feloniously embezzle the same, and so did feloniously steal, take, and carry away the same, &c.

The prisoner was first clerk to the Collector of Customs at the Port of *Falmouth*, and as such it was his duty to receive and place in the Collector's box each day moneys received in payment of customs. He had, during the day, the key to the

only lock that was kept on it. There was another lock which was put on each night, after the contents were examined, and of this the Controller kept the key. The facts were clear to prove that the prisoner must both have taken money out of the box on the day in question, and also have omitted to deposit all he received. The prisoner was appointed by the Commissioners of Customs, under 3 & 4 W. 4. c. 51.

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It was objected by *Saunders*, for the prisoner, that the prisoner could not be convicted on the first count, not being such a clerk as was contemplated in the 7 & 8 G. 4. c. 29, which was intended to protect masters against depredations of clerks and servants in their private service, and did not extend to public servants.

2dly, That the counts under the 2 W. 4. c. 4. were bad, inasmuch as they did not allege that the prisoner embezzled whilst he was such clerk. The allegation of his being clerk was confined to the fact of receiving the money, and did not necessarily extend to the time of the embezzlement.

COLERIDGE J., after hearing argument on both sides on the point, said, the great doubt I have had is on the first point, whether or no the 7 & 8 G. 4. c. 29. s. 46. was meant to include public servants of the Crown, such as the prisoner. It would seem intended to protect the private dealings of the subjects only against their clerks and servants; and the terms of the 2 W. 4. c. 4. seem to confirm this view of it, by specially providing for such a case as this. But it is unnecessary to determine that point, as I

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have no doubt that this is a case upon the facts within the latter act, and I am clearly of opinion that the indictment is good. If the fact of the prisoner's continuing clerk be necessary to the offence, the indictment, grammatically taken, would perhaps contain a sufficient averment of that fact. But it is by no means clear, that an embezzlement (if such a case be possible), after a person ceased to be clerk or servant, of money received whilst he was such, would not be within the act. The statute, in its words, does not necessarily imply that he should embezzle whilst clerk or servant, and if it does so imply it, the indictment, which pursues the same terms, also implies it. The case must go to the jury.

Verdict Guilty on the embezzlement counts,
and sentence of transportation accordingly.

Bompas Serjt., *Erle*, and *Moody* for prosecution.
Saunders for the prisoner.

BRIDGEWATER.

BRIDGEWATER,
August 13.

HALLETT v. COUSENS.

Where a witness in cross-examination denies having used particular expressions in the presence of the parties,

CASE for malicious prosecution on a charge of felony.

A witness for the plaintiff, who was present at the time of the apprehension of the plaintiff by

the opposite counsel examining a person to contradict the witness, is not at liberty to lead by reading from his brief the words denied; the conversation spoken to by the first witness being evidence in itself.

the defendant, and when he was given in charge by the defendant to a constable, was asked, in cross-examination, whether he had not used certain expressions in a conversation which then took place between the plaintiff and defendant, and in which the witness took part. The witness denied using the expressions.

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For the defence, a person was called to prove that the witness had said what he denied, and on the counsel for the defendant reading from his brief the very words which the witness had so denied having used,

ERSKINE J. interposed and said, that the counsel was not entitled so to lead his witness; that the rule had been misunderstood; that it did not apply to conversations which were evidence in themselves. The object in allowing particular words to be put to the witness is to exclude the other parts of the conversation which are not evidence, when made in the absence of the parties. In this case the examination must proceed in the usual way by asking what passed.

The jury were ultimately discharged.

Bompas Serjt. and *Edwards* for the plaintiff.
Erle and *Bere* for the defendant.

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BRISTOL.

*Coram COLERIDGE J.*BRISTOL,
August 19.

DOE dem. WILDGOOSE v. PEARCE.

An unproved will more than thirty years old coming from the possession of one of the family of the testator, may be read without accounting for the subscribing witnesses, though the person producing it be not strictly entitled to the custody.

THE lessor of the plaintiff claimed the premises in dispute in this ejectment under the will of his father, who died in 1795. The will was dated in 1792, and by it the testator devised the premises in fee (after the death of his wife, whom he made executrix) to his six children, as tenants in common, of whom the lessor of the plaintiff, the widow of one *John Wildgoose*, was one. The widow of the testator lived until about eight years before the trial, and the premises had been occupied since the death of the testator by the widow, or by the eldest son, of the testator, and the principal question in the cause was, whether the son had occupied under the widow, or in his own right as heir at law. The will had never been proved; but was shown to have been delivered by the widow of the testator, some years after his death, to the lessor of the plaintiff; and one witness, who knew the testator, swore to his hand-writing. On the counsel for the lessor of the plaintiff proceeding to have the will read, it was objected that, though thirty years old, it could not be read, inasmuch as it did not

come from the proper custody. No particular right to the custody was shown in the lessor of the plaintiff; and the proper custody of a will disposing of personal property, as this did, though of small amount, was the Ecclesiastical Court of the diocese.

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COLERIDGE J. I think the plaintiff is entitled to have the will read. It is not necessary that the custody from which an ancient document comes should be strictly according to the legal right; it is enough if it be brought from a place of deposit where, in the ordinary course of things, such a document, if genuine, might reasonably be expected to be found. This is an unproved will, and the proper place of custody of such a will is not the Bishop's registry; it is natural to find it in the possession of some of the family of the testator, who derive a benefit from it. I think, therefore, the custody is here sufficiently accounted for.

Verdict for the plaintiff. (a)

(a) See Accord. *Doe dem. Neale v. Samples* (8 Ad. & E. 151.). The lessor of the plaintiff in that case claimed under a mortgage in fee by *J. S.* deceased, executed in 1821; and the defendant's case was, that *J. S.* was, at the date of the mortgage, only seised for life; he having, on his marriage, in 1785, executed a deed by which, being then seised in fee, he had settled the estate, giving himself only a life estate, remainder to his children, &c., of whom the defendant was one; and, in proof of this case, the defendant's attorney produced the deed of settlement, bearing date the 9th of *November*, 1785, which he had found amongst the papers of *J. S.* It was objected, that evidence of its due execution was necessary, inasmuch as it did not come from the proper place of deposit; for that it

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DOE dem.
WILDGOOSE
v.
PEARCE.

A new trial was moved for in *Michaelmas* term on other points, but no objection was made to the above ruling. (a)

should, if genuine, have been amongst the papers of the trustees of the marriage settlement, not amongst those of the party against whom its provisions were to operate. The Lord Chief Justice overruled the objection, and a motion to enter a verdict for the plaintiff on the objection was refused; *Patteson J.* saying, "I never understood that the custody to be shewn, for the purpose of making a document evidence without proof of execution, was necessarily that of a person strictly entitled to the possession; it is enough if the person be so connected with the deed that he may reasonably be supposed to be in possession of it without fraud, no such fraud being proved."

(a) 5 M. & W. 506.

C A S E S
 ARGUED AND DECIDED
AT NISI PRIUS
 IN THE COURTS OF
 Q. B., C. P. & EXCHEQUER,
 AT THE SITTINGS AFTER
MICHAELMAS TERM,
 3 VICT. 1839.

SITTINGS IN Q. B. AFTER MICHAELMAS TERM.

DOE dem. CHAS. GOSLEY *v.* GOSLEY.

1839.

 WESTMINSTER,
 December 2.

THE lessor of the plaintiff in this case claimed the premises in question as heir at law of *Thomas Gosley* in the first instance, and

Humfrey, having proved the title and heirship, closed his case.

Watson, for the defendant, then put in and proved a will of *Thomas Gosley*, executed in 1837. And upon *Humfrey*, for the plaintiff, offering in reply a will of 1838, by which the estates in question were devised to the lessor of the plaintiff, *Watson*

Where a plaintiff in ejectment makes out a *prima facie* case as heir at law, and is answered by a will being set up for the defendant, he is at liberty, in reply, to put in a subsequent will, whereby the estates claimed were devised to him.

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 DOE dem:
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 GOSLEY.

objected that, inasmuch as that will formed the title of the lessor of the plaintiff, it ought to have been put in as part of the plaintiff's case in chief.

Humfrey for the plaintiff. The will now produced operates as a revocation of the former will, and leaves the plaintiff entitled as heir at law merely; and it is admissible within the rule as evidence in contradiction of the defendant's case.

Lord DENMAN C. J. was of that opinion, and admitted the evidence.

Verdict for the defendant.

Humfrey and Peacock for the plaintiff.

Watson for the defendant.

Clayton v. Corby.
 2. Ad. C. Ell. N. S. 1813.

WESTMINSTER,
 December 7.

CLAY v. SHACKERAY.

In trespass,
 upon issue
 joined whether the
 defendant had
 for thirty
 years enjoyed
 as of right a
 certain privilege,
 &c., upon the plaintiff's land, the plaintiff, in order to raise the presumption that the enjoyment was permissive, may give in evidence an old lease made to the defendant's predecessor, and expiring immediately before the commencement of the thirty years, whereby the leasee was entitled to the privilege, &c. during the term. It is not necessary in such a case for the plaintiff to reply the lease specially under 2 & 3 W. 4. c. 71. s. 5.

TRESPASS for breaking and entering certain closes, part of an estate called *Fullwell*, and trampling upon the grass, and digging the soil, &c.

Plea, That the defendant was possessed of a certain ancient mill called *Isleworth Mill*; and that

Plea, That the defendant was possessed of a certain ancient mill called *Isleworth Mill*; and that

he and all those in possession of the mill had, for a period of twenty years, used, exercised, and enjoyed, as of right, the privilege of entering in and upon the lands adjoining the mill-stream, called *Twickenham Mill-stream*, and of repairing the banks, and of digging and heaping up the soil adjoining the banks, for the purpose of the repairs, and justifying the entry and trespass in respect of the said right. The same plea was repeated, alleging this enjoyment for thirty, forty, and sixty years respectively. To all these pleas the plaintiff replied, traversing the enjoyment as of right; and issues were joined thereon.

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CLAY
v.
SHACKERAY.

For the defendant, the fact of the banks of the stream having been from time to time repaired by the occupiers of the mill, was clearly shewn for a very long period, as far back almost as living memory; and the existence of the mill and of the mill-stream was clearly established from the year 1758 at least. But it was contended for the plaintiff that, from the year 1758 to 1805, there was an unity of possession of the mill and of the plaintiff's property called *Fullwell*, and that from that period the repairs were done by permission and not of right. As to this, the facts were, that one *Betts* was formerly in possession of the mill under the Earl of *Northumberland*; and whilst he was so in possession, viz. in 1758, the Earl of *Feversham*, being owner of the *Fullwell* estate, granted a lease thereof to him, at a certain rent, for forty-seven years, with privilege to raise, by earth from the adjoining lands, the banks of the stream for the purpose of the mill: and the lease con-

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tained a covenant by *Betts* to keep up the banks, and protect the land from being flooded. *Betts* underleased for all but three days of the term which he had in the *Fullwell* property, and continued in possession of the mill till 1799; when one *Winslow* became possessed of the mill under the Duke of *Northumberland* by lease, and soon after became seised of the reversion in *Fullwell* property. In 1805 *Winslow* died, and thereupon the *Fullwell* property was sold, and the mill came into the hands of other persons under *Winslow's* executors.

Upon the *Attorney-General*, for the plaintiff, offering in evidence the lease of 1758 for the purpose of shewing the creation and exercise of the privilege during the term, and of explaining the continued enjoyment after its expiration as by permission,

Cresswell, for the defendant, objected that it ought to have been pleaded in reply, under 2 & 3 *W. 4. c. 71. s. 5.*, inasmuch as the evidence offered did not go to negative the enjoyment, but to shew that it was by a contract in writing. This was clearly the effect of the evidence, so far as respected the plea of sixty years' user: and as to the two first pleas, if the user during the last thirty years was to be controlled by the production of the deed, it was equally necessary to reply it specially to those pleas.

The *Attorney-General*. I offer it to explain the enjoyment, and to shew that it was not of ad-

verse right. The parties continued to use the privilege granted after the expiration of the lease, but must be taken to be doing so under the permission derived from the lease; the same as a tenant holding over after the expiration of his term. *Tickle v. Brown.* (a)

1889.

CLAY
v.
SHACKERAY.

LORD DENMAN C. J. was of opinion that the evidence was admissible, and it was accordingly received.

In summing up, his Lordship said that the pleas of forty and sixty years were disposed of by unity of possession; but expressed a strong opinion against the inference of a permissive enjoyment after the expiration of the lease, and left the question to the jury, whether the exercise by the parties was for the last thirty years as of right, or upon the understanding of a permission.

Verdict for the defendant on the pleas alleging the twenty and thirty years' user.

Sir J. Campbell A. G., Sir W. Follett, and Watson for the plaintiff.

Cresswell, Wightman, and Corrie for the defendant.

(a) 4 Ad. & Ell. 369.

1839.

SITTINGS IN THE COMMON PLEAS,
AFTER MICHAELMAS TERM.

WESTMINSTER,
November 29.

WHITEHEAD and Another v. BARRON.

A member of a joint stock company is not liable to be sued for the price of goods ordered by the Company to be made for them before he became a member, although such goods were delivered afterwards.

THIS was an action of *assumpsit* for goods sold and delivered.

Plea, *Non assumpsit*.

The plaintiffs were iron-founders, and the action was brought to recover 555*l.*, the prices of certain iron boilers delivered by them in *October* 1836 to the "United Kingdom Patent Beet-root Association," of which association it was alleged the defendant was a member, and therefore liable to the present demand.

It appeared that in *May* 1836 prospectuses were issued by certain individuals for the formation of the association in question, announcing that the capital was to be 250,000*l.*, divided into 10,000 shares of 25*l.* each; that the directors had already made the necessary arrangements for commencing the business; that they had agreed for a lease of the premises; and that the apparatus was in a forward state. In the course of the same month the defendant wrote to the secretary, requesting to be allowed to have thirty shares in the company; the directors assented to this application, and in *June* the defendant paid the deposit of

21. on each share into the bankers of the association, and subsequently (in *November*) paid one call per share ; but on the second call being made, he got rid of his shares.

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 WHITEHEAD
 and ANOTHER
 v.
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The boilers were delivered and accepted at the company's premises in *October* 1836, with an invoice as follows: "Messrs. the United Kingdom Beet-root Sugar Association, two wrought-iron boilers to order," &c.; but there was no evidence by whom, or when, the order was given. The shares were subscribed for by a very few subscribers, and the association commenced operations in *December* 1836; but early in the next year, the subscribers making default in complying with the calls, the directors abandoned the business, and were no longer to be met with. No deed of settlement was ever drawn up, and deposits were paid apparently on only 1,100 or 1,200 shares; on payment of the deposits, certificates were issued by the secretary to each shareholder making such payment, certifying that he was the holder of the shares therein mentioned of the association. It did not appear that the capital was ever paid up, or that the nominal shareholders were persons at all competent to raise it.

For the defendant it was contended, that there was no actual partnership of which the defendant was a member; that it was a mere proposal, from which the defendant had a right to recede; and that, indeed, the association (such as it was) actually formed, differed essentially from that proposed, amongst other points, in the essential one

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WHITEHEAD
and ANOTHER
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BARRON.

of the amount of *capital* and the number of shares subscribed for, and on which deposits had been paid. *Pitchford v. Davis* (a) was relied upon.

TINDAL C. J. left two questions to the jury, — 1st. Whether the defendant was ever a partner? — 2dly. Whether he was a partner at the time the order for the goods was given?—and his Lordship requested them, in the first instance, to answer the second question, because if that were answered in the negative, the first question became immaterial. As to the second question, his Lordship pointed out to the jury, that even conceding the defendant to be a partner, he had only become one from the end of *May* 1836, and no evidence had been tendered by the plaintiff as to the time when the order was actually given; but the prospectus issued in *May* described the apparatus as being then in a forward state, and announced that the directors had then made arrangements for commencing operations. The boilers were actually delivered in *October*: and the question for the jury was, whether they inferred that an order of this kind, completed in *October*, was, or was not, given before the defendant applied for and took the shares? If they thought the order had then been given and accepted, the defendant could not be made liable for work done on the credit of others, merely because the order was completed and the goods delivered after his accession to the company.

(a) 5 Mees. & W. p. 2.

The jury found that the defendant was not a member of the company when the order for the goods was given, and there was accordingly a
Verdict for the defendant.

1839.

Kelly and *Martin* for plaintiff.

Sir *F. Pollock*, *Bompas*, and *Goulburn*, Serjts.,
for the defendant.

HOGGETT v. OXLEY.

Guernsey Hall.
No. 49. 4th. 404.
23. d. 9. 213. 267.

GUILDHALL,
December 10.

ASSUMPSIT on a charterparty, by which the defendant was bound to provide and put on board the plaintiff's ship at *Marseilles* a full cargo of corn, to be carried to *England*, at the rate of 7s. per quarter. The declaration averred that the defendant refused to furnish the cargo, and that in consequence thereof the plaintiff's ship was detained at *Marseilles*, and compelled to bring over an insufficient cargo of other merchandize.

Plea, That before any breach of the contract declared upon, another contract was substituted by the parties in lieu of it, and issue thereon.

Where it can be collected from the pleadings and statements of counsel that substantial damages are the object of an action, the plaintiff has the right to begin, though all the issues are on the defendant.

Bompas Serjt., for the defendant, claimed the right to begin. The only issue was on him; for the defendant admitted the contract declared upon, and the breach of it, and relied solely on the substituted contract, which he undertook to prove.

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HOGGETT
v.
OXLEY.

Richards, contra. The action is brought for substantial damages, and the amount of those damages must be matter of proof to be produced by the plaintiff. He, therefore, according to the present practice, is the party entitled to begin.

MAULE J. said, it seems to me impossible to lay down any precise rule on a matter of this kind ; each case must stand on its own circumstances, and the Judge must collect from the pleadings and statements, as well as he can, whether the action be brought to recover substantial damages, and whether the plaintiff is under the necessity of giving evidence to satisfy a jury what the amount of those damages ought to be. It seems to me that in this instance the plaintiff will be under that necessity, and that he therefore has a right to begin.

The plaintiff accordingly began.

The defendant afterwards abandoned his plea ; and in the result the only question between the parties was the amount of damages.

Verdict for the plaintiff. (a)

Richards and *Wordsworth* for the plaintiff.
Bompas Serjt. for the defendant.

(a) See *Ridgway v. Ewbank*, *suprà*, p. 217.

1839.

INGRAM v. LAWSON.

GUILDHALL.
December 12.

CASE for a libel published in the *Times* newspaper on the plaintiff, in respect of his business, as master and owner of a ship called the *Larkins*, and also on the ship, stating that the ship was not sea-worthy.

Pleas. Not Guilty; and 2dly, that the ship was not sea-worthy. On these pleas issues were joined. There was another plea, which was demurred to, and judgment was given for the plaintiff. The record was made up in the usual form, to try the issues, and also to assess the damages in respect of the matters whereof the defendant had put himself on the judgment of the Court.

Where a plea has been demurred to, the defendant, on the trial of issues joined on other pleas, has no right to advert to the matters alleged in the plea demurred to, as matters admitted by the plaintiff, though the *venue* be to assess the damages on the demurrer, as well as to try the issues.

Platt, for the defendant, in his address to the jury was proceeding to advert to the plea, and comment on the facts stated in it; upon which

Kelly objected that the defendant had no right to treat that plea or the facts stated in it as evidence in the cause at all; otherwise it would be only for a party to plead a bad plea to provoke a demurrer, and so get the advantage of his own statement without any proof. That in fact, the matters whereon the jury were to assess damages were only the matters in the declaration.

Platt contended that he had a right to advert to the whole record before the Court; and the plain-

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INGRAM
v.
LAWSON.

tiff, by demurring to the plea, had admitted the facts stated therein; that it had recently been decided in the *Common Pleas* that it was necessary to make up the record in this form, when a demurrer to a plea had been decided in favour of the plaintiff.

MAULE J. That goes to show that you have no right to use the privilege you claim. I thought at first the form of the record was voluntary on the plaintiff's part, and so he might have given you the right to use it; but I am now quite clear that you have no right to use the demurrer, to the extent of admitting the facts in the plea: you cannot so take advantage of your own wrong statement. I think you cannot advert to the plea.

Verdict for the plaintiff.

Kelly, Channel, and John Henderson for the plaintiff.

Platt and Humfrey for the defendant.

GUILDHALL,
December 16.

OSBORN and Others v. THOMPSON.

In an action on the warranty of a horse, the plea alleging that the horse was sound, and issue

ASSUMPSIT on the warranty of a horse. The declaration averred that the defendant undertook that the horse was sound, except crib-biting; breach, that the horse was not sound except crib-

joined thereon, the plaintiff is entitled to begin. Where the horse warranted is exhibited to the jury in the presence of witnesses during the defendant's case, the plaintiff cannot call veterinary witnesses attending the view to give their then opinion, he having had the opportunity of inspection before closing his case.

biting, but on the contrary was, besides and except crib-biting, unsound. Plea, that the horse was, besides and except crib-biting, sound ; and of this, &c.

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 OSBORN and
 OTHERS
 v.
 THOMPSON.

Bompas Serjt., for the defendant, claimed the right to begin. He said that the point had been so decided by COLERIDGE J., at the last *Bristol Assizes* in a cause of *Fisher v. Joyce (a)*, in a record containing precisely the same words, as to this point : that the real question was, whether the defendant had performed his contract ; the affirmation of that issue is on him ; and unless he proves it, the plaintiff is entitled to a verdict.

Atcherley Serjt., *contra*. The affirmative of proof is on the plaintiff ; the test adopted now by all the Judges, is, who would be entitled to the verdict if no evidence were given ? The plaintiff must prove the unsoundness, or he would not be entitled to a verdict ; he must prove that the defendant broke his contract : and he cited, *ex relatione Talfourd* Serjt., a case in which the Chief Justice had ruled that, on similar pleadings, the plaintiff was entitled to begin.

ERSKINE J. If there were no other decision on this point than that of my brother COLERIDGE, and I had to act on that as his abiding opinion, such is my respect for his judgment that I should hesitate to act in opposition to it, though in principle I were of the opposite opinion. But I happen to have talked with that learned Judge on the sub-

(a) This case has been omitted by the editors, for the reason alluded to by his lordship.

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OSBORN and
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THOMPSON.

ject of his ruling in that case, and I know that he entertains doubts as to its correctness ; I have also to set against his opinion the ruling of the Chief Justice to which reference has been made. I must therefore look to principles for my decision ; and if I do that, I am clear that the plaintiff is entitled to begin. The true test is, on whom is the burden of proof ? Suppose this an undefended cause, would the plaintiff be entitled to a verdict ? Clearly not, without calling witnesses. And, supposing him to call witnesses who were entirely to break down, would not the defendant be entitled to a verdict ? On the other hand, if the defendant were to begin, and to call witnesses who knew nothing about the matter, would the plaintiff be entitled to a verdict ? Clearly not, without proof that the horse was unsound. The unsoundness must consist in some particular disease or defect ; and proof must be given of its existence, or it can not be presumed.

The plaintiff accordingly began.

The cause lasted over the first day ; and on the morning of the second day the horse was exhibited to the jury, in the presence of many witnesses and the attorneys. This was done at the suggestion of the Judge, after several witnesses had been called for the defendant. It had been stated during the plaintiff's case that the horse was in a stable hard by, in obedience to a notice to produce him given by the plaintiff's attorney ; but no application was made on the plaintiff's part to see him, or to allow veterinary surgeons to see him. At the close of the case for the defendant,

Atcherley Serjt. applied to be allowed to recall his veterinary witnesses, to speak as to their examination of the horse this morning.

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 v.
 THOMPSON.

ERSKINE J. said he could not allow it without the consent of the defendant's counsel; that the plaintiff had the opportunity of seeing the horse before the close of his case, and might have given this evidence in chief.

The witnesses were not allowed to be recalled.

The jury were ultimately discharged without agreeing on their verdict.

Atcherley Serjt., *Humphrey*, and *Bramwell*, for the plaintiff.

Bompas Serjt., and *Shee*, for the defendant.

SMITH and Others, Assignees of FRANCIS
 MORGAN v. MORGAN.

GUILDHALL,
 December 19.

TROVER for divers bills of exchange, and goods and chattels.

Pleas. 1st. Not Guilty. 2d. No bankruptcy. 3d. Plaintiffs not possessed.

Talfourd Serjt. for the defendant, asked one of the plaintiff's witnesses whether, on a particular occasion which happened prior to the bankruptcy,

The declarations of a party suing as a representative of others, made before he became such, are evidence.

Where a witness had been examined before Commission-

ers of Bankrupt shortly after the act of bankruptcy, *Semble*, that he may refer to the deposition he then made, for the purpose of refreshing his memory as to the date.

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SMITH and
OTHERS
v.
MORGAN.

he had not heard the plaintiff *Smith* say something relating to the transaction in question.

Sir *F. Pollock* objected that the declaration of a party, clothed with a representative character, made before he became such, could not be evidence to affect the interests of the creditors : there was no connection between them till the appointment of assignees ; the declaration of an executor, though party to the record, made before the death of the testator, could not be evidence.

TINDAL C. J. Such a distinction is new to me ; the general rule is, that the declarations of a party to the record are evidence : and there seems to me nothing to take this out of the rule.

The question objected to was accordingly put.

Sir *F. Pollock* for the plaintiff called a shopman of the bankrupt who had been examined before the commissioners to prove the act of bankruptcy. The witness said now he was uncertain whether an execution (material to be proved in order to show an act of bankruptcy) was put in on the 4th or the 5th day of *May*, 1838.

Sir *F. Pollock* then proposed to put into the witness's hand his deposition taken before the commissioners on the 12th *May* 1838, to refresh his memory.

Talfourd Serjt. objected that this could not be done ; that it would in effect be cross-examining

the party's own witness, and leading him to say in the box what he had said before ; it was on this principle that an examination taken by an attorney in the cause could not be put into a witness's hand for the purpose now proposed.

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SMITH and
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v.
MORGAN.

Sir *F. Pollock*. The rule is universal, that what a witness writes, or what is taken down in writing for him, immediately after a transaction, is admissible to refresh his memory. Even an account given to the attorney, if read over and signed by the party, immediately after the transaction, may be so used.

TINDAL C. J. I find it decided by a case in *Espinasse's Reports* (a), that an aged witness may refer to his depositions, taken shortly after the alleged bankruptcy, for the purpose of refreshing his memory as to the date : I shall therefore allow it to be done now in obedience to that case. I say nothing as to the case put of an examination by an attorney.

On the witness being desired by Sir *F. Pollock* to read the whole deposition,

Talfourd Serjt. again objected, and

TINDAL C. J. said, I cannot allow him to look at more than the date of the transaction as to which he is uncertain. 'It would be leading a witness too

(a) *Vaughan v. Martin*, 1 Esp. 440.

1839.

much to attempt to bind him down to all that he had thus said.

Verdict for the plaintiff.

Sir *F. Pollock* and *Humfrey* for the plaintiff.

Talfourd Serjt. and *Bagster* for the defendant.

SITTINGS IN THE COURT OF EXCHEQUER IN AND
AFTER MICHAELMAS TERM, 3 VICT.

SITTINGS IN TERM.

GUILDHALL.

EMERY v. CLARK.

In an action on the case for negligent driving, where the defendant's possession of the carriage, alleged to have been negligently driven, is stated in the declaration by way of inducement, such possession is admitted by the plea of Not Guilty.

ACTION on the case for negligently driving against the plaintiff.

The declaration stated, in the form of inducement, that the plaintiff was lawfully passing along the highway, and that the defendant was possessed of a certain carriage which he was then driving by a certain servant of his. The declaration then alleged, in the usual way, that the defendant, by his said servant, so negligently drove his said carriage, that by and through his negligence, &c. in that behalf, &c.

Plea, Not Guilty.

The plaintiff closed his case without giving evidence that the carriage which ran against him belonged to the defendant, or that the person driving it was a servant of the defendant, whereupon

Humfrey objected, that some proof was necessary of these facts, for that the plea of Not Guilty only admitted the inducement, properly so called, and not the very act complained of as the gist of the action : and he stated that the point was now pending in the Queen's Bench, in a case of *Wolfe v. Beard*.

1839.


 EMERY
v.
CLARK.

Byles, for the plaintiff, was about to give some evidence to meet the objection, when *Alderson B.* stopped him, saying it had recently been decided by the Court of Common Pleas, in *Taverner v. Little (a)*, and he saw no ground for dissenting from that decision, that the ownership of the carriage, and the fact of its being driven by the defendant's servant, as alleged in the inducement, was admitted by the plea of Not Guilty. His Lordship therefore refused to allow the plaintiff to occupy time in proving what was admitted on the record.

The evidence was not given.

Verdict for the plaintiff. (*b*)

Byles for the plaintiff.

Humfrey for the defendant.

(*a*) 5 New Ca. 678.

(*b*) Since this case was tried, that of *Wolfe v. Beard* (referred to by the defendant's counsel,) came on to be argued in the Court of Queen's Bench ; but *Humfrey* admitting that if *Taverner v. Little* were good law, he could not support his rule in *Wolfe v. Beard*, the Court intimated that they concurred in the decision of the Court of Common Pleas in the case mentioned, and *Humfrey's* rule was accordingly discharged without argument. It may be taken, therefore, to be settled that the plea of Not Guilty to an action of this nature admits,

1839.



SITTINGS AFTER TERM.

CRANK v. FRITH.

Debt on bond.

Pleas. 1st. *Non est factum*. 2d. Fraud and covin, and other pleas.

Where the subscribing witness to an instrument has become blind, the instrument can not be proved without calling him.

The bond was attested by one *Crundwell*, a subscribing witness, who had become blind; and a witness was called who proved the fact of *Crundwell's* blindness and his handwriting; but on cross examination he stated that *Crundwell* was well, and in attendance about the court. The handwriting of the defendant was also proved.

Humfrey contended that the evidence was not sufficient without calling the subscribing witness—that though blind, he might remember the transaction.

Jervis, contrd, cited *Wood v. Drury* (a), 1 Star-
kie on Evidence, 325.; Roscoe on Evidence, 82.;
and *Pedler v. Paige*. (b) He said the rule was

under the new rules, not only the plaintiff's ownership of the carriage injured (which is properly matter of inducement, within the terms of the Rule IV. Hilary Term, 4 W. 4.), but also the fact of the *defendant's* ownership, and of his being the party who drove the carriage alleged to have been negligently driven, if those facts (in themselves not strictly matter of inducement) are alleged in that part of the declaration which usually contains what is matter of inducement.

(a) 1 Ld. Raym. 734.

(b) 1 Moo. and Rob. 258.

Rees v. Williams
1 D. & G. 514
WESTMINSTER,
November 28.

satisfied, by simply proving the handwriting of the attesting witness: if the other side required more, he should call the attesting witness.

1839.

CRANK
v.
FRITH.

Lord ABINGER said he was decidedly of opinion, that the bond ought not to be read without calling the witness; that he did not agree with the principle of the text writer, or assent to the authority of the cases: the witness might, on recollection, give material evidence relating to the transaction.

Upon this, *Jervis*, for the plaintiff, called the witness, and the jury found a

Verdict for the plaintiff.

Jervis and *Perry* for the plaintiff.

Humfrey for the defendant.

CARTER v. JOHNSON and Others.

TRESPASS for breaking and entering a dwelling-house, and taking goods.

Pleas. Not Guilty. 2dly. As to taking the goods, that the goods were not the goods of the plaintiff, in manner and form, &c. 3dly. That the defendants, sheriffs of *London*, seized the goods, at the time when, &c., under a writ of execution against one *Bright*, and that the goods were *Bright's* goods, not the plaintiff's, in manner and form, &c.

to the plaintiff's possession.

Cause Brice -
19. d. f. Inst. 28.

In trespass, on pleas of, 1. Not Guilty, and 2. That the goods were not the goods of the plaintiff, and issues thereon, the defendant can not set up property in a stranger, under whom he does not justify, in answer to the plaintiff's possession.

3. 404
Windham
6 Ad. 280
2 v. 166

1839.
CARTER
v.
JOHNSON and
OTHERS.

The plaintiff claimed under a bill of sale, made by *Bright* in *January* 1839, and the main question in the cause was, whether the bill of sale was fraudulent, as against creditors; but *Humfrey*, in opening his case for the defendant, said, he should put the plaintiff out of court by proving the bankruptcy of *Bright* at the time of the alleged bill of sale; that a fiat issued in *June* 1838 against him, under which he was declared a bankrupt, and assignees appointed; and further, that the bill of sale was in fact itself an act of bankruptcy, and passed no property to the plaintiff; that the property being, under these circumstances, in the assignees, the defendants would be entitled to a verdict on the second plea.

Petersdorff, for the plaintiff, contended that the evidence was inadmissible, and that, in trespass, possession was sufficient proof of property. He cited *Heath v. Millward (a)*, where, in trespass *quare clausum fregit*, the court held mere possession sufficient to entitle the plaintiff to a verdict on a plea alleging that the close was not the plaintiff's close.

Humfrey said that the contrary rule had been laid down in an action of trover, where, under the plea of Not possessed, the defendant was allowed to show that the plaintiff had no property in the goods.

(a) 2 New Ca. 98.

Lord ABINGER C. B. The defendants are *prima facie* wrong doers, and mere possession in the plaintiff is enough against a wrong-doer. The defendants did not commit the act complained of under the authority of the assignees; for the execution was put in adversely to their title. The case in the Common Pleas appears to me to have decided the present question, and I think the evidence not admissible.

1839.
CARTER
v.
JOHNSON and
OTHERS.

The evidence was rejected.

Verdict for the plaintiff.

Kelly and *Petersdorff* for the plaintiff.

Humfrey for the defendant.

CASES
ARGUED AND DECIDED
AT NISI PRIUS
IN THE COURTS OF
C. P. AND EXCHEQUER,
AT THE SITTINGS AFTER
HILARY TERM,
3 VICT.

ADJOURNED SITTINGS IN THE COMMON PLEAS.

1840.

GUILDHALL,
Feb. 17.

NORRIS v. SOLOMON.

A note, written by a creditor, at the foot of an account, requesting the debtor to pay that account to A. B., and which the creditor delivered to A. B., for

the purpose of his getting in the money for the creditor, is not a bill of exchange, or order for payment of money within the Stamp Act.

ASSUMPSIT for goods sold and delivered.

Plea, General Issue — *Non assumpsit*.

To prove the amount of the goods sold, the plaintiff called a witness, who said that he was a clerk to Messrs. *Oliver & Son*, accountants; that he received from them a written account, which had been handed to them by the plaintiff for the purpose

of getting in the amount ; that he called upon the defendant with that account, and shewed it to him, and that a conversation took place between the witness and the defendant, amounting, as it was said, to an admission by the latter that the sum mentioned in the account was due to the plaintiff; but the amount could only be proved by reference to that written account, which was in the following form :

1840.
NORRIS
v.
SOLOMON.

“ Mr. *Samuel Solomon*, 50. *Long Lane*, *Smithfield*,

“ Dr. to *R. Norris*.

“ 1839. *January 22*. To goods - £8 14 0

“ *May 9*. Ditto - - 1 6 0

“ *September 19*. To bill unpaid 19 19 2

“ 28. To goods - 4 5 5

£ 34 4 7

“ *August 27*. Cash £3

Ditto 4

£7 - 7 0 0

£27 4 7

And at the foot of the account the plaintiff had written the words following :

“ Mr. *Solomon*,

“ Please to pay the above account to

“ Messrs. *Oliver & Son*, 7. *Lawrence Lane*, and oblige,

“ Yours respectfully,

“ *R. Norris*.

“ 24th *Dec.* 1839.”

1840.

NORRIS
v.
SOLOMON.

Bompas Serjt., for the defendant, objected that the instrument was, in operation of law, a bill of exchange, or order for the payment of money, within the words of the Stamp Act (55 G.3. c.184.), and could not be used in evidence without a bill stamp.

The learned Judge recalled the witness, to ascertain whether *Oliver & Son* had any interest in the sum sought to be collected, or whether the account was delivered to them merely as agents of, and for the benefit of, the plaintiff. The witness proved that the latter was the fact; whereupon *Griffen*, for the plaintiff, maintained, that the memorandum at the foot of the account did not amount to a bill, or order for the payment of money. *Oliver & Son* were merely the agents of the plaintiff, to whom he requests the money to be paid, not on their own account, but for him.

Bompas Serjt. submitted that it made no difference whether the payees were to receive the money for themselves, or for the plaintiff: if that circumstance prevented an instrument from amounting to a bill of exchange, half the instruments drawn abroad and intended for bills would not be such, for it was every day's practice to make foreign bills payable to some party in this country, merely as agent for the drawers, and on their account.

MAULE J. I am of opinion that this is not a bill of exchange, nor anything like one.

Bompas Serjt. tendered a bill of exceptions to

the ruling of the learned Judge ; but his Lordship said he had no doubt upon the subject, and the document was accordingly, under his Lordship's direction, received in evidence.

Verdict for the plaintiff,
with a certificate for immediate execution.

Griffen for the plaintiff.

Bompas Serjt. for the defendant.

1840.
NORRIS
v.
SOLOMON.

ADJOURNED SITTINGS IN THE EXCHEQUER.

GREEN and Another v. SUTTON, UNDER-
HILL, WHITEHOUSE, JOHNSON, and
Seventeen Others.

GUILDHALL,
Feb. 17.

*Ball. v. Banks -
2. Mar. 1840. 250.*

ASSUMPSIT against the defendants as drawers of a bill of exchange : 2d count for goods sold and delivered.

Plea (by the four defendants above named), as to the first count, that they did not draw the bill of exchange *modo et formâ*, &c. ; as to the second count, *Non assumpserunt*.

The other seventeen defendants suffered judgment by default.

In an action *ex contractu*, a defendant who has suffered judgment by default, is not a competent witness for the plaintiff against other defendants who plead to the action. *Pipe Steele 2. Feb. 1840. 733*

The defendants were sued as the members of a joint stock company, called "The *Birmingham*

1840.

 GREEN and
 ANOTHER
 v.
 SUTTON and
 OTHERS.

Patent Horse-shoe and Iron Tip and Heel Company." The bill in question was drawn by *J. S.*, ostensibly as agent for the company, and there was no question but that the goods had been sold and delivered to the company.

In order to prove that the defendants, who pleaded to the action, were liable as members of the company, *Wightman*, for the plaintiffs, called one of the seventeen defendants who had suffered judgment by default.

Platt objected that the witness was incompetent to give evidence for the plaintiffs. He had a direct interest to divide his liability with the four defendants, who denied that they were members of the company; and it had been decided by numerous authorities that such an interest was sufficient to exclude his testimony.

Wightman, contra. It is true the witness has the degree of interest which has been pointed out, in establishing the liability of his co-defendant: but, then, he has a still greater interest on the other side; for if the plaintiffs do not succeed in fixing the defendants, who have pleaded, the action, being *ex contractu*, will fail even against those who have suffered judgment by default; and so the witness will be released not only from a part of his liability, but from his entire liability to the action. If the interest of the witness be *in equilibrio*, he is competent; *a fortiori*, where (as in the present case) he has a greater interest against the party calling him, than in favour of that party.

The mere circumstance of his being a co-defendant would not exclude him. (*Worrall v. Jones (a)*.)

Platt, in reply. In *Worrall v. Jones*, the defendant, who suffered judgment by default, was admitted as a witness against the co-defendants, but they were merely sureties for the witness, and against whom he could have no right to contribution: the objection, therefore, against his competency did not apply.

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GREEN and
ANOTHER
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OTHERS.

LORD ABINGER C. B. The witness certainly is not competent. He admits, by suffering judgment by default, that he is liable to the plaintiff's demand. Surely, then, he is directly interested in throwing part of that burden on another person.

The witness was rejected.

Wightman then produced the deed of settlement, to show that the three defendants, *Underhill*, *Whitehouse*, and *Johnson* were parties to it; but, on its being produced, it appeared that *Whitehouse* and *Johnson* had not executed it, but that *Underhill* (with whom they were in partnership) had executed it in the form following: "*Underhill and Co.*"

LORD ABINGER C. B. That will not do: a partner has no presumed authority to execute deeds for his copartners: unless you can shew that *Underhill* was authorized by deed to do so, you cannot make the execution by *Underhill* available against *Whitehouse* and *Johnson*.

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 GREEN and
 ANOTHER
 v.
 SUTTON and
 OTHERS.

The plaintiffs could not carry the case further against these three defendants, and there was a
 Nonsuit. (a)

Wightman and Smithies for the plaintiff.
Platt and Humfrey for the defendants.

(a) It has been decided, that a defendant who suffers judgment by default in an action on a contract, is not competent for the other defendants to negative the contract, on the ground that, by procuring a verdict for the defendant who pleads, he, in effect, discharges himself also from liability (*Brown v. Fox*, 1 Phill. Evid. 78.); and it has also been held that he is not a competent witness for the plaintiff, on the ground taken in the principal case, viz. that he has an interest in establishing his right to contribution against the co-defendants (*Brown v. Brown*, 4 Taunt. 752.; *Mant v. Mainwaring*, 8 Taunt. 139.): but it seems difficult to understand how a witness can be thus interested on both sides. When it is established on which side the interest of the witness preponderates, he becomes a competent witness for the other side; and if both the decisions can be supported, it would seem that it can only be on account of the difficulty, amounting almost to impossibility, of ascertaining at the trial on which side the interest *does* preponderate; for that question would seem to depend upon the proportion that the costs of the action (which the witness would get rid of by procuring a verdict for the co-defendant) bear to the amount of contribution, which, by procuring a verdict for the plaintiff, he would entitle himself to, as against the co-defendant. Considering, however, the present leaning of the courts against the exclusion of evidence, it might, perhaps, be supposed that the difficulty of ascertaining on which side the balance of interest preponderates, should rather be a ground for admitting the witness, (subject to observations as to the degree of credit due to him,) than for rejecting him altogether.

CASES
 ARGUED AND DECIDED
AT NISI PRIUS
 IN THE COURTS OF
 QUEEN'S BENCH, COMMON PLEAS, AND
 EXCHEQUER,
 AND ON THE
 NORTHERN AND WESTERN CIRCUITS.

SPRING ASSIZES, 3 VICTORIA.
 YORK.

Coram COLERIDGE J.

WOOD and Others v. MACKINSON and
 Another.

1840.
 YORK,
 March 9.

Assumpsit for goods sold and delivered.
 Plea, non-assumpsit.

Cresswell, for the plaintiffs, called one *Mansell* into the box, who was sworn in the usual way; but before he had put any question to the witness, he said he had been mis-instructed as to what the witness was able to prove, and he should not examine him at all. The witness being thereupon about to retire,

A witness called under a mistake of counsel as to his being able to speak to a transaction, is not liable to cross-examination, though sworn, if the mistake be discovered before any question is put.

Alexander, for the defendants, claimed the right to cross-examine him.

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 and Others
 v.
 MACKINSON
 and Another.

Cresswell objected, that as he had not asked the witness any question, the defendants had no right to cross-examine him. He cited *Simpson v. Smith* (a), *Phillips v. Eamor* (b), *Clifford v. Hunter* (c), to show that where a witness had been sworn by mistake, he was not subject to be cross-examined by the adverse party. Here he had been instructed that *Mansell* was the witness competent to prove a particular transaction, part of the plaintiff's case ; but before any question was put, the attorney had discovered the error, and in fact the witness was only wanted for the purpose of producing a document.

Alexander and *Wightman contra*, admitted that if the witness had been only called for the purpose of producing a document, and the officer had, by mistake, unnecessarily administered the oath to him ; or if a different person from the one really intended had stepped into the box, and been sworn before the error was discovered, in neither of these cases could the defendants claim the right to cross-examine him : but here there was no mistake ; *Mansell* was the identical person whom the plaintiff's counsel wished to call ; and it was admitted that he wished to call him, not for the purpose of merely producing a document, but for the purpose of giving evidence. It was not because the party calling the witness afterwards found it might be inconvenient to bring his testimony before the jury, that he could thus deprive the adverse party of

(a) 1 Phill. Ev. 909. 8th edit.
 (c) 3 Carr. & P. 16

(b) 1 Esp. R. 357.

his right to cross-examine him. The cases where it was laid down that a right to cross-examine did not accrue where the witness had been sworn by mere mistake, must clearly be understood of a mistake on the part of the officer of the court.

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 and Others
 v.
 MAOKINSON
 and Another.

Cresswell referred to *Simpson v. Smith*, as showing that the rule was not confined to mistakes on the part of the officer.

COLERIDGE J. I have considerable difficulty in satisfying myself that the authorities referred to, and especially the case decided by Mr. Justice *Holroyd* (a) (whose opinions are entitled to so much weight), refer merely to the case of a witness sworn by a mistake of the officer; and, upon the whole, it appears to me that the more satisfactory principle to lay down is this, that if there really be a mistake, whether on the part of counsel or officer, and that mistake be discovered before the examination in chief has begun, the adverse party ought not to have the right to take advantage of this mistake by cross-examining the witness. Here the learned counsel explains that there has been a mistake, which consists in this, that the witness is found not to be able to speak at all as to the transaction which was supposed to be within his knowledge. This is, I think, such a mistake as entitles the party calling the witness to withdraw him without his being subject to cross-examination. If, indeed, the witness had been able to give evidence of the transaction which he was called to prove, but the

(a) *Simpson v. Smith*.

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 WOOD
 and Others
 v.
 MACKINSON
 and Another.

counsel had discovered that the witness, besides that transaction, knew other matters inconvenient to be disclosed, and therefore attempted to withdraw him, that would be a different case. I think the defendants have here no right to cross-examine the witness.

The witness accordingly withdrew without being cross-examined, and was afterwards called and examined by the defendants, as one of their witnesses.

Verdict for plaintiffs. (a)

Cresswell, Starkie, and J. L. Adolphus for the plaintiffs.

Alexander and Wightman for the defendants.

(a) See *Rush v. Smith*, 1 C. M. & R. 94.

YORK.

Coram ERSKINE J.

YORK,
 March 14.

REGINA v. PRINGLE.

An indictment charging an offence on a day within the present reign, and concluding against the peace of her majesty, is not supported by proof of an offence on a day in a former reign; and the objection entitles the prisoner to an acquittal.

INDICTMENT for uttering a forged receipt, purporting to be a receipt for money payable to a pensioner of Chelsea Hospital. All the counts alleged the act of uttering to have been committed on the 21st of *June*, in the first year of the reign of *Queen Victoria*, and they all concluded “against the peace of our lady the now Queen.”—

On the examination of the prosecutor's principal witness it appeared that the act of uttering was committed in the month of *April* 1837 (*a*), whereupon

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REGINA
v.
PRINGLE.

Baines, for the prisoner, contended, that the indictment was bad — the offence was now proved to have been committed in the reign of a former sovereign, and should have been described as committed against the peace of that sovereign. It was quite clear, that, according to the old law, this was a fatal objection; and though the recent statute (7 G. 4. c. 64. s. 20.) had cured the defect to a certain extent, viz. by providing that no judgment should be stayed for an erroneous statement of this kind, still it was competent to the accused to take this objection even now, if he took it before verdict or judgment. It had been held, for instance, that if the objection was upon the face of the indictment, it was bad on demurrer (*Rex v. W. Smith*). (*b*) It may be conceded, perhaps, that such is the proper course to be taken, where the objection is on the face of the record: but here the allegations on the record are correct, the offence being stated as committed on the 21st day of *June* (which was the day after her Majesty's accession), and the conclusion being "against the peace of the now Queen." The prisoner, therefore, could not demur; and unless this were the time for him to object, it must follow, that, however irregular this conclusion might be, there would be no means of objecting.

(*a*) Her present Majesty acceded to the throne on the 20th day of *June* 1837.

(*b*) *Ante*, p. 109.

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 v.
 PRINGLE.

Atcherley, Serjt., Armstrong, and Hoggins contra.

This is in effect merely an objection, that the offence is not proved to have been committed on the precise day alleged in the indictment; but the precise day being immaterial, a variance in the allegation of that day cannot be fatal. If it would have been sufficient to prove the offence to have been committed in the second year of the Queen's reign, though alleged to have been committed in the first, why is it not equally good to prove that it was committed in the year *before* her reign, viz. the last year of the reign of King *William*? The allegation is, however, since the statute 7 G. 4., wholly immaterial, and neither the omission of it altogether, nor any error in the mode of making the allegation, can now be successfully insisted on.

ERSKINE J. I think that is not the correct view of the statute. It provides that an objection of this kind shall not be taken at a certain time, viz. as a ground for staying judgment; but that very expression shows that it was not meant to deprive the accused altogether of the right to take such an objection. Then has he taken it in due time? if the objection appear on the face of the record (as in the case cited) he should demur: but here he could not demur, the record being, on the face of it, correct. I think, therefore, the objection is in time. Then, is the variance objected to a fatal one? The point comes before me for the first time, but it appears to me the variance is a fatal one; not on the ground that the offence is proved to have been committed on a different day from

that alleged, because I admit it would be sufficient to prove it on any day in any year of the Queen's reign : but here, there is a distinct averment, that the uttering, in whatever year committed, was committed against the peace of the now Queen. Now, the proof negatives that averment, and I think the variance constitutes a fatal objection. I must direct the prisoner to be acquitted.

The prisoner was accordingly acquitted.

Atcherley Serjt., *Armstrong*, and *Hoggins* for the prosecution.

Baines and *Wortley* for the prisoner.

LIVERPOOL.

Coram COLERIDGE J.

REGINA v. EMMONS.

LIVERPOOL,
March 28.

INDICTMENT for feloniously being found at large in England before the expiration of a term of seven years, for which the prisoner had been transported, against the form of the statute, &c.

The prisoner pleaded guilty.

Robinson applied to the learned judge for an order on the county treasurer, directing the reward of 20*l.* to be paid to the prosecutor who had discovered and brought the prisoner to conviction, in pursuance of the statute 5 *Geo.* 4. c. 84. s. 22., "that whoever shall discover and prosecute to conviction any such offender so being at large within

The judge before whom a prisoner is tried for returning from transportation has power to order the county treasurer to pay the prosecutor the reward under 5 *G.* 4. c. 84. s. 22.

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v.

EMMONS.

“ this kingdom, shall be entitled to a reward of 20*l*.
“ for every such offender so convicted.”

COLERIDGE J. said it did not appear to him that the words cited gave him authority to make any order ; a reward was given, but no provision being made for the mode of recovering it, he apprehended that the prosecutor must resort to the Home Office for payment.

At a subsequent part of the day *Robinson* said he had been furnished by Mr. *Shuttleworth*, the deputy clerk of the crown for the County Palatine, with a manuscript note, whereby it appeared that the same question had arisen on this circuit soon after the passing of the act, viz. in 1828, before Mr. Justice *Bayley* ; and that his lordship had then said that though it was true that the new act 5 *Geo. 4. c. 84.* omitted to point out (as the old act 16 *Geo. 2. c. 15. s. 3.* pointed out) the fund from which the reward was to come, the twelve judges had nevertheless considered the point, and had come to an opinion that the order should still be made on the county treasurer ; that the order was accordingly made by that learned judge, and that that precedent had been frequently followed on this circuit.

COLERIDGE J. thereupon made an order on the county treasurer, on an affidavit being made that the prosecutor had discovered the prisoner.

Robinson for the prosecution.

The prisoner was undefended.

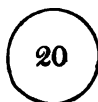
REGINA v. JOHN LEE.

1840.
LIVERPOOL,
March 31.

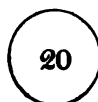
INDICTMENT for uttering a forged promissory note.

An indictment under stat. 11 G. 4. and 1 W. 4. c. 66. for uttering a forged foreign promissory note, need not allege it to be payable out of England.

The first count stated that the prisoner uttered, disposed of, and put off a certain forged promissory note, which said note is as follows, that is to say :



" No. 10101



K

" The North River Bank

" Will pay to *C. Trinder*

" or bearer the sum of twenty dollars on demand.

" *A. B. Kays*, Cash'.

L. Kip, Pres'."

with intent to defraud one *Lawrence Kip* and others (he the said *J. Lee* at the time he so uttered the said forged note then and there well knowing the same to be forged), against the form of the statute, &c., and against the peace, &c.

The second count stated the uttering to be of a certain other promissory note, for the payment of twenty dollars of the current coin of the United States of *America*.

It appeared in evidence, that the note in question had been originally a genuine two dollar note, issued by the *North River Bank of New York*, and

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 REGINA
 v.
 JOHN LEE.

that the forgery consisted in the word "twenty" being substituted for the word "two," and the figures 20 for 2.

Ramshay, for the prisoner, contended that, as the note was a foreign note, the uttering of which in *England* was made an offence by 11 *Geo.* 4. & 1 *W.* 4. c. 66. s. 30. (a), the indictment ought to have stated that the note was payable out of *England*.

E. Perry, contra. The offence of uttering forged foreign notes in *England* being put by this statute exactly on the same footing as the utterance of forged *English* notes, there is now no distinction between them, and therefore, on principle, no averment can be required as to the place where the note is payable; and there is no decision to shew that it is necessary.

COLERIDGE J. over-ruled the objection.

The prisoner was acquitted.

Perry and *Cardwell* for the prosecution.

Ramshay for the prisoner.

(a) It is enacted by this section, "That if any person shall in
 " *England* forge, &c. or utter, &c. any bill of exchange or pro-
 " missory note, &c. for the payment of money, &c. in *whatever*
 " *place or country out of England*, whether under the dominion of
 " his majesty or not, the money payable or secured by such bill,
 " note, &c. may be, or may purport to be, payable, &c., every
 " such person shall be deemed to be an offender, &c. and shall
 " be punishable in the same manner as if the money had been
 " payable, or had purported to be payable in *England*."

CASES
ARGUED AND DECIDED
AT NISI PRIUS
IN THE COURTS OF
Q. B. C. P. AND EXCHEQUER,
AT THE SITTINGS AFTER
EASTER TERM, 3 VICT., AND TRINITY TERM,
4 VICT.

LONDON.
SITTINGS AFTER EASTER TERM.

Doe d. THOMPSON v. HODGSON.

1840.

GUILDHALL.

THIS was an ejectment by landlord against tenant. In the course of the plaintiff's case the defendant was required to produce, on notice, several receipts for rent, with a view of shewing the period at which the year of tenancy commenced and expired, and also the recognition by the defendant of the lessor of the plaintiff as his landlord.

The receipts, though called for by the lessor of the plaintiff, were not produced; and he gave secondary evidence of their contents.

The defendant, on cross-examination of the plaintiff's witness, proved the handwriting of the lessor of the plaintiff to one of the receipts, but did nothing further with it at that time.

Where a party refuses to produce a document after notice, and secondary evidence is in consequence given, he cannot afterwards put in the document as part of his own case.

On the trial of an ejectment by landlord against tenant, where the defendant appears, the plaintiff may, under 1 G. 4. c. 87., recover for mesne profits, without proving notice of trial.

1840.

Doe d.
THOMPSON

v.

HODGSON.

In his address to the jury the defendant's counsel proposed to read the receipts, and put them in evidence regularly as part of his case.

Greenwood objected to their admissibility on the ground of their not being produced at the proper time, when called for upon notice.

Lord DENMAN C. J. was of opinion that after the defendant had refused to produce the documents when duly required, and had thus suffered the lessor of the plaintiff to give secondary evidence of their contents, it was too late now to offer them in evidence; and his Lordship accordingly rejected the evidence.

In the same case evidence was offered of the amount of mesne profits under the provisions of the statute 1 *Geo. 4. c. 87. s. 2.*

Richards, for the defendant, objected to the recovery of mesne profits under this statute, upon the ground that the plaintiff had given no proof that the tenant or his attorney had been served with due notice of trial, which he insisted was required by the second section, which enacts that "wherever
" hereafter *it shall appear* on the trial of any eject-
" ment at the suit of a landlord against a tenant
" that such tenant or his attorney hath been served
" with due notice of trial, the plaintiff shall not be
" nonsuited for default, &c., and the judge before
" whom such cause shall come on to be tried
" shall, whether the defendant shall appear on
" such trial or not, permit the plaintiff on the trial,

“ after proof of his right to recover possession, to
“ go into evidence of the mesne profits,” &c.

1840.
Doe d.
THOMPSON
v.
HODGSON.

Lord DENMAN overruled the objection, and the
evidence was received.

Verdict for the lessor of plaintiff,
and 20*l.* assessed for mesne profits.

John Greenwood for the plaintiff.

R. V. Richards for the defendant.

In Trinity Term, *Richards* moved for a rule
for a new trial on both points. The rule was how-
ever refused.

SITTINGS AFTER TRINITY TERM.

BROWN v. PHILPOT.

WESTMINSTER,
June 30.

ASSUMPSIT. Indorsee against acceptor of a bill of
exchange.

Pleas. 1st. That the defendant did not accept the
bill. 2d. That the defendant accepted the bill for
the accommodation of the drawer, that the drawer
indorsed it to *A. B.*, without consideration, in order
that he might get it discounted for him, but that
A. B. fraudulently indorsed it to *C. D.* without any
consideration ; and that *C. D.* afterwards indorsed
it to the plaintiff without any consideration.

On replication
De injuriâ to
a plea by the
acceptor of a
bill, that it was
accepted for
the accommo-
dation of the
drawer, and
by him in-
dorsed to *A.B.*
without con-
sideration for
the purpose of
raising money,
and by *A.B.*
fraudulently
indorsed to
C.D. without
consideration,
and by him to

Replication. *De injuriâ*, &c.

the plaintiff, without consideration, the defendant must prove the want of considera-
tion from plaintiff to *C. D.*

1840.

BROWN

v.

PHILPOT.

Kelly, for the defendant, offered evidence to prove that the bill was accepted for the accommodation of the drawer; also, that it was delivered to *A. B.* for the purpose stated in the plea, and by him fraudulently indorsed to *C. D.*, but he had no evidence to show affirmatively that it was indorsed to the plaintiff by *C. D.* without consideration. He contended, however, on the authority of the rule laid down in *Heath v. Sansom* (a), that the evidence which he was prepared to give was sufficient to throw on the plaintiff the onus of proving that he had given some consideration for the bill.

Lord DENMAN C. J. The judges of this court have latterly had this point under their consideration, and we think the rule alluded to was never any thing more than a conventional rule; but that since the defence is now put on the record, and avers in terms that the bill came into the hands of the plaintiff without consideration, it becomes necessary for the defendant, in support of his plea, to prove that averment by shewing that there was no consideration.

Kelly not being able to produce any such evidence, there was a

Verdict for the plaintiff. (b)

Sir F. Pollock and *C. Jones* for plaintiff.

Kelly and *Greening* for defendant.

(a) 2 B. & Adolph. 291.

(b) See *Mills v. Barber*, 1 Mee. & W. 425. *Jacob v. Hungate*, 1 Moo. & Rob. 445.

1840.

ADJOURNED SITTINGS IN THE COMMON PLEAS.

GUILDHALL,
Feb. 25. (a)

POLE, Chairman of the Sun Life Assurance Society *v.* ROGERS, Chairman of the Union Life Assurance Office. (a)

Moses a Whall.
So. Reg. Oct. 484.
S. Ad. c. 22. s. 1. 44.

ASSUMPSIT on a policy of assurance for the sum of 5000*l.* on the life of *Peter Cochrane*, for the term of two years and a half. The declaration contained an averment, that the policy was effected in pursuance of a declaration subscribed by the plaintiff, containing (amongst other things) the statement that the said *Peter Cochrane* was not accustomed to any habits prejudicial to health, and was in a sound state of health, and was not afflicted with any disorder tending to shorten life: it was also averred in the declaration, that the policy contained a stipulation, that the same should be void if obtained by any misrepresentation as to the state of health. The declaration then averred that the said assurance was not obtained through any misrepresentation of the age, state of health, or description of the said *Peter Cochrane*, and that he died within the term, &c.

Declaration on a policy of insurance alleged that the same was effected in pursuance of a declaration by the plaintiff, averring, amongst other things, that the party whose life was insured was not accustomed to any habits prejudicial to health, and was in a sound state of health, and the policy was to be void in case of misrepresentation. Pleas. 1st, that the party was accustomed to habits prejudicial to health, to wit, of drunkenness. 2d, that the

Pleas. First, That the policy was effected on the basis of the said declaration subscribed by

Party was in a bad and unsound state of health. Replication *De injuria*. Held, that the defendant was entitled to begin.

(a) This case was unavoidably omitted in its due place.

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POLE,
Chairman of
the Sun Life
Assurance
Society,
v.
ROGERS,
Chairman of
the Union Life
Assurance
Office.

the plaintiff, and under an agreement, that the same should be void if the plaintiff had made any untrue averment, &c., and that the plaintiff did make an untrue averment and misrepresentation in this, that the said *Peter Cochrane* had been and was accustomed to certain habits prejudicial to health, to wit, habits of intemperance and drunkenness, and the plea concluded with a verification.

Second Plea, That the plaintiff did, in and by the said declaration, make an untrue averment in this, that the said *Peter Cochrane* had been and was in a bad and unsound state of health (concluding with a verification).


Third, That the said *Peter Cochrane* was afflicted with a disorder tending to shorten life (concluding with a verification).

There were two other pleas, throwing the affirmative clearly on the defendant.

Replication to each plea, That the defendant of his own wrong, and without the cause alleged, broke his promise, &c.

Upon these pleadings, *The Attorney-General*, for the defendant, claimed the right to begin, on the ground that the affirmative of the above issues was on the defendant, and, unless the defendant proved them the plaintiff would be entitled to a verdict; that the right to begin depended on the question, whether the plaintiff or the defendant would be entitled to a verdict, if no evidence were

offered; and he was ready to admit the plaintiff's right to a verdict, unless the defendant proved some of his pleas; for it could not be presumed that habits prejudicial to health, or a disorder tending to shorten life, existed, without proof.

1840.

 POLE,
 Chairman of
 the Sun Life
 Assurance
 Society,
 v.
 ROGERS,
 Chairman of
 the Union Life
 Assurance
 Office.

Wilde Serjt. S. G., *contra*, relied on the averment in the declaration, that the policy was not obtained through any misrepresentation, and that the declaration subscribed was in fact true. This averment, in reality, threw on the plaintiff the proof of *Peter Cochrane's* habits and state of health, the pleas being nothing more than a denial of the declaration; in the same manner as in a warranty of a horse, the declaration alleging that the horse was not sound, and the defendant pleading that it was sound, and issue joined thereon, the plaintiff always begins. And he cited *Rawlins v. Desborough (a)*, as an authority directly in point.

TINDAL C. J. The cases on this subject furnish me so little assistance in deciding the question, that I am obliged to rely on my own judgment as applied to the peculiar allegations in these pleadings; and, on the whole, I think that the burthen of proof is on the defendant. No rule is more general than that he who alleges a fact must prove it. On the first issue, I think the defendant is clearly bound to prove the habits prejudicial to health on which he relies. The second issue may not be free from doubt, but I think the defendant

(a) 3 Carr. & P. 321.

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POLK,
 Chairman of
 the Sun Life
 Assurance
 Society,

v.
ROGERS,
 Chairman of
 the Union Life
 Assurance
 Office.

must prove that Mr. *Cochrane* was in a bad state of health; and unless he does show some disorder, or badness of health, the plaintiff might be consuming much time in proving that which it might turn out the defendant does not deny.

The defendant accordingly began.

Verdict for defendant. (a)

Wilde Serjt. S. G., *Thesiger*, *Kelly*, and *W. H. Watson*, for the plaintiff.

Sir J. Campbell A. G., *Sir F. Pollock*, *Talfourd* Serjt., and *R. V. Richards* for the defendant.

ADJOURNED SITTINGS IN THE EXCHEQUER.

GUILDHALL,
 July 10.

SECCOMBE and Others *v.* WOOD.

The owners of a vessel disabled by the negligence of its crew are answerable for damage done by its accidentally drifting, when so disabled, against another vessel.

THIS was an action on the case to recover damages for an injury done to the vessel of the plaintiffs by being run down by the defendant's vessel.

One ground of defence was, that a few minutes previously to the collision of the defendant's vessel with the plaintiffs', the defendant's vessel had been foul of another, at about half a mile distant, and been so much injured that she would not answer the helm, and was quite unmanageable; and that the injury to the plaintiffs' vessel was therefore a sheer accident, and not the ground of an action.

(a) See *Rawlins v. Desborough*, post, p. 328.

Lord ABINGER C. B. said that it was no defence that the injury was accidental and wholly involuntary on the part of the defendant, unless the vessel had become unmanageable without his fault.

If the first collision was by the fault of the defendant, that is to say, if it was by his own negligence, or the negligence of his crew, that his vessel was first rendered unmanageable, it was, in point of law, by his own negligence that the second collision took place.

Verdict for the plaintiffs.

Thesiger and Greenwood for the plaintiffs.

Atcherley Serjt. and Humfrey for the defendant.

1840.
SECCOMBE
and Others
v.
WOOD.

SUMMER ASSIZES, 4 VICT.

YORK.

Coram ROLFE B.

REGINA v. WETTENHALL.

YORK,
July 10.

INDICTMENT for perjury.

The defendant was taken into custody under a Bench warrant, issued during the assizes, on a bill found at the same assizes.

Knowles applied to have the defendant admitted to bail, to appear and take his trial at the next assizes, without pleading or traversing in the usual

A party arrested during the assizes under an indictment for a misdemeanour cannot be discharged on bail without pleading and traversing.

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 v.
 WETTEN-
 HALL.

way, the party not having been in custody, nor having entered into recognizances, twenty days before the assizes; and he said that although some years ago *Parke* B., on this circuit, had refused a similar motion, he did so, on the ground that the party applying had there entered into recognizances to appear at the assizes, seeming to think that a different rule would apply if he had not been held to bail until the assizes.

ROLFE B. said that he could not understand Mr. Baron *Parke*'s distinction, and thought this was not a case at all provided for by the statute (60 G. 3. and 1 G. 4. c. 4. ss. 3. & 5.). The rule must be as it was before the statute; *i. e.* the party must plead, and may then traverse if he please: and his Lordship added, that on enquiry he found such had been the practice on this circuit.

The motion was accordingly refused.

DORCHESTER.

Coram MAULE J.

DORCHESTER,
 July 22.

REGINA v. HOUNSELL.

An indictment for concealing the birth of a child, "by secretly disposing of the dead body," without showing the mode of disposing of the dead body, is bad.

THIS was an indictment for concealment of the birth of a bastard child. There were two counts, but the first was clearly insensible and bad. The second count stated that the defendant on, &c., at, &c., was delivered of a male child, &c.; and that she did then and there, "by secretly

“ disposing of the dead body,” endeavour to conceal the birth thereof, &c.

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REGINA
v.
HOUNSELL.

On the prisoner being called upon to plead, *Stock* proposed to demur to the indictment; and, on stating his objections, the first count was admitted to be bad. To the second count he objected that it was bad, inasmuch as it did not specify the mode of disposing of the body, and that the mode ought to be stated to enable the court to see whether it amounted to the complete disposition contemplated by the statute; that many cases of temporary concealment might occur which would be short of the offence: one method, viz. secret burying, was specified; and if any other secret disposal were the subject of indictment, it must be some other which as completely destroyed or put away the evidence of any child having existed. He referred to *Cruse's* case, 2 Moody C. C. R. 53.

It was proposed to take the argument then; but on *MAULE J.* expressing a strong opinion that the objection was good, *Cockburn*, for the prosecution, declined to press the case, and a verdict of Not Guilty was taken. (a)

Cockburn for the prosecution.

Stock for the prisoner.

(a) See next case.

1840.

DORCHESTER,
July 22.

REGINA v. EMMA ASH. (a)

On an indictment for concealing the birth of a child, a final disposing of the body must be shown; hiding the body in a place from which a further removal is contemplated will not support the indictment.

THE prisoner was indicted for the murder of a female child. The evidence was, that the prisoner had been delivered of a child, and had placed it in a drawer, where it was found locked up, the drawer being opened by a key taken from the prisoner's pocket.

The prisoner was acquitted of the murder on the evidence of two medical men, who were not able to state positively that the child was born alive.

It was objected, on behalf of the prisoner, that she could not be convicted on this evidence of concealing the birth, the words "otherwise disposing of," in the Act of Parliament, contemplating a final disposing of the body, similar to what takes place by the act of "secret burying;" and *Snell's* case (b) was referred to.

MAULE J. was of this opinion, and directed the jury to acquit the prisoner.

Acquittal. (c)

Bond for the prosecution.

Cockburn for the prisoner.

(a) See preceding case.

(b) See ante, p. 44.

(c) REGINA v. BELL.

THE prisoner was indicted at the spring assizes for *Northumberland*, 1841, under the statute 9 G. 4. c. 31. for feloniously dis-

posing of the body of her infant child. It appeared by the evidence, that she had placed it in a box in her bed-room; and this was relied on by the prosecution as a disposing of the body within the act.

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 REGINA
 v.
 EMMA ASH.

ROLFE B. was, however, clearly of opinion that the statute contemplated some mode of disposing of the body *ejusdem generis* with the preceding term "burying;" as by burning, or cutting to pieces, &c., or by hiding it in some place intended for its final deposit. Here it was clear that the body had been placed by the prisoner in a box in her bed-room merely for a temporary purpose, and with a view to ultimate deposit in another place. His Lordship accordingly recommended the jury to acquit.

Acquittal.

Wortley for the prosecution.

The prisoner was undefended.

The same point was again decided by the learned Baron in a similar way at *York* (*Regina v. Halton*), and afterwards by *Maule J.* at *Liverpool*, in *Regina v. Mary Jones* (5th April, 1841).

1840.

DEVON.

Coram MAULE J.

EXETER,
July 28.

REGINA v. WILLIAM BURRIDGE.

Sending a letter to *A. B.* threatening to burn a house of which he is owner, but let by him to, and occupied by, a tenant, is not an offence within the
4 G. 4. c. 54.
s. 3.

THIS was an indictment for sending a threatening letter. It was averred in the first and second counts that the prisoner "knowingly, wilfully, and feloniously did send to one *George Ley* a certain letter, without any name subscribed thereto, directed as follows; that is to say, "For Mr. *George Ley*, at *Corkington*, near *Torquay*, *Devon*;" threatening to burn and destroy a certain house then belonging to and being the property of the said *George Ley*, then being a subject of our said lady the Queen, which said letter then and there was as follows; that is to say, (the letter was then set out; the material part, correcting the false spelling, ran as follows:— "Dear friend, I have taken the opportunity to inform you, that if you don't turn out *Thomas Elliott* out of your house and ground, I will put a fire to the house by *Christmas Day*,") against the form of the statute, &c. The third and fourth counts described the house as "a certain house situated at *Abbots Kerswill*, in the said county, and then being in the possession of one *Thomas Elliott*, and then belonging to and being the property of the said *George Ley*."

It appeared that the house was the property of *George Ley*, and inhabited by *Thomas Elliott*, as his tenant; and that the letter was received by post by *George Ley*.

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Merivale, for the prisoner, contended that upon the words of the statute 4 G. 4. c. 54. s. 3., "If any person shall knowingly and wilfully send or deliver any letter or writing, &c., threatening to kill or murder any of his Majesty's subjects, or to burn or destroy his or their houses, out-houses, barns, stacks of corn or grain, hay or straw," the term *his* must have a possessory meaning; and, according to the analogy of the well-known rule of law in the cases of burglary and arson, the "house" must be laid as that of the party actually dwelling therein; the house of any one, in contemplation of law, meaning his dwelling-house. Consequently the first count could not be supported, which merely laid it as the property of the owner of the reversion. The third described it to be "in the possession" of *Thomas Elliott*, the person actually dwelling in it; but the offence would then be that of sending a letter to *George Ley*, threatening to burn the house of *Thomas Elliott*; and it was not contended that it was sent to the former with a view to its reaching the latter. This was held to be no offence within the repealed clause of the act 27 G. 2. c. 15., of which the language, as to this part of it, is the same with that of 4 G. 4. c. 54. s. 3. *Rex v. Paddle.* (a)

H. A. Merewether, for the prosecution, con-

(a) Russ. & R. C. C. R. 484.

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tended that the offence was complete if the letter conveyed a threat which might reasonably be held sufficient to intimidate the party to whom it was sent; and that, with this view, the "house" might well be considered as that of the reversioner.

MAULE J. was of opinion that the offence was not within the meaning of the statute. It must otherwise be admitted that if a party should have any interest whatever in a house, such as a reversion expectant on the determination of a particular estate, however remote or contingent, the house would be sufficiently described as "his." As to the other counts, the offence charged was that of sending a letter to *A.* threatening to burn the house of *B.*, which, according to the case cited, was not within the act.

Not guilty.

Merewether for the prosecution,
Merivale for the prisoner.

EXETER.

Coram COLERIDGE J.

EXETER,

July 29.

CARPENTER v. BULLER.

Doc d. Croft in Peckham
B. Sur. 460.
 A release executed by several commoners of their separate rights of common over the same waste, is sufficient to make them all competent witnesses in an action touching the extent of the waste, though there be only one stamp.

TRESPASS *quare clausum fregit*. Pleas, not guilty, and not possessed, &c.

The question in the cause was, whether the land was the property of the plaintiff, or belonged to the defendant. The question was, whether the land was the property of the plaintiff, or belonged to the defendant. The question was, whether the land was the property of the plaintiff, or belonged to the defendant.

to the defendant, as part of the waste of the manor which belonged to him. For the defendant several commoners of the manor were called; and an objection being taken that they were interested in enlarging the common of the manor, a release was tendered, executed by several persons claiming right of common, and releasing to the defendant each of their respective rights of common over the *locus in quo*.

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Only one stamp was affixed to the deed.

Bere objected that the deed was admissible only for one witness, inasmuch as each conveyed a distinct and separate interest only to the defendant; the rights of common were not joint, but separately appurtenant to separate estates.

COLERIDGE J. ruled that the release was admissible for the purpose of making all the releasors witnesses; the estate discharged was one, though the interest of each might be several. When there is one common fund one release is enough. (a)

Verdict for the plaintiff.

Bere, Rowe, and Butt, for the plaintiff.

Bompas Serjt., Erle, Crowder, and Buller, for the defendant.

(a) See *Davis v. Williams*, 13 East. R. 232.

1840.

WELLS.

Coram MAULE J.

WELLS,
August 12.

GLUBB and Another v. EDWARDS, Clerk.

A deed executed in the presence of a subscribing witness, proved to be abroad at the time of the trial, is admissible on proof of the witness's writing, notwithstanding the power to examine on interrogatories under 1 W. 4. c. 22. s. 4.

COVENANT on an indenture, made between defendant of the first part, his wife of the second part, and the plaintiffs of the third part.


Plea, *non est factum*.

The indenture being put in, purported to be executed by the defendant, in the presence of one *Bawden*, formerly an attorney residing at *Chard*. It was shown that *Bawden* had left the neighbourhood in embarrassed circumstances, and was now residing at *St. Servan*, in *France*, where a witness who was called had seen him, and proposed his coming to give evidence in this cause, which he refused to do; upon this the handwriting of *Bawden*, as attesting witness, was proved.

Erle then proposed that the deed should be read.

It was objected that the proof was insufficient; for although the Court of King's Bench had held,

in *Prince v. Blackburn* (a), that where an attesting witness was abroad, evidence of his handwriting would be sufficient to prove the execution of the deed, yet that decision took place at a time when the courts of common law had no authority to issue a commission for the examination of witnesses abroad; but since the passing of 1 W. 4. c. 22. s. 4. such secondary evidence was no longer necessary, and ought not to be admitted.

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 GLUBB and
 Another
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 Clerk.

MAULE J. overruled the objection; but said, that as the point was new, he would give the defendant leave to move to enter a nonsuit. (a)

Verdict for the plaintiff.

Erle and *Butt* for the plaintiff.

Manning Serjt. for the defendant.

No attempt was afterwards made to disturb the verdict.

(a) 2 East. Rep. 250.; and see *Hodnet v. Forman*, 1 Stark. R. 90.

1840.

Coram COLERIDGE J.

WELLS,
August 13.

REGINA v. HICKS.

On an indictment for child-murder, bad for not stating the name of the child or accounting for the omission, no conviction for concealing the birth can take place.

THE prisoner was indicted for child-murder. The indictment, in the usual form, stated that the prisoner on, &c. was delivered of a male child, born alive, and then and there made an assault, &c.; but the indictment gave no name to the child, nor stated it to be of name unknown. Upon the case being called on, an objection was taken that the indictment for murder was bad, on the authority of *Regina v. Biss.* (a) Coleridge J. was of this opinion; whereupon Stone, for the prosecution, contended that the indictment might be good for the concealment, and the trial ought to proceed, as the cases of conviction for concealment generally proceeded on the supposition that the child was born dead; in which case there could be no name.

To this it was answered, that the indictment being bad for its professed and primary purpose, was bad altogether; and that the statute enabling a jury to convict for concealment in a trial for murder could not be construed to give effect to a bad indictment for any purpose, especially as the indictment contained no averment of concealment of the birth.

(a) 2 Moo. C. C. R. 93.; and see *Regina v. Jane Hogg*, post. (Summer Assizes for Carlisle, 1841.)

COLERIDGE J., after consulting MAULE J., said, I had no doubt on this point myself; but thought it right to consult my brother MAULE on account of the importance of the case; and he agrees with me in thinking that it would be impossible on this indictment to proceed to a valid conviction for concealment. The indictment being bad for its professed purpose, is bad altogether, and mere waste paper. It would be too much to say that the statute authorising a conviction for concealment meant to discharge the prosecutor from all rules of pleading whatever, and to enact that whenever it appeared that the prisoner had concealed the birth by secret burying, she might be convicted and punished. The prisoner must be acquitted on this indictment.

Not guilty.

Stone for the prosecution.

Moody and *Bere* for the prisoner.

Coram MAULE J.

FRY v. MONCKTON.

WELLS,
August 13.

TRESPASS *quare clausum fregit*. Pleas: Not guilty. 2d, That the close was not the close of the plaintiff. 3d, That the close was the close, soil, and freehold of the defendant. 4th, A right of way

In trespass *quare clausum fregit*, where there are several issues, and amongst them one on the plaintiff's possession of the close, the plaintiff has a right to a trial of all the other issues, though it appears on the opening of the evidence that he was not in possession of the close.

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used by the defendant, &c., for horses, carts, &c. for twenty years. 5th, The same right used, &c. for forty years. And issues thereon.

The first witness called for the plaintiff to prove the trespasses, on cross-examination, proved that the plaintiff was out of possession at the time of the trespasses, having let the estate to a tenant for some time before.

Upon this *Crowder* insisted that the plaintiff should be nonsuited; or that a verdict should be returned for the defendant on the issue which negatived the plaintiff's right to the close, and the jury be discharged as to the other issues.

Erle refused to be nonsuited, and claimed to proceed to the trial of the remaining issues, which were issues material to questions of rights between the parties; and the plaintiff was entitled to a decision of them for the purpose of costs.

MAULE J. was, at first, strongly inclined to discharge the jury on those issues; but after hearing argument, and consulting COLERIDGE J., said that the plaintiff had a right to have the opinion of the jury on all the issues, and the trial must proceed.

Witnesses were accordingly called on both sides, and the jury returned a verdict for the plaintiff on all the issues except the second, and for the defendant on that issue.

Erle and *Moody* for the plaintiff.
Crowder and *Kinglake* for the defendant.

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Coram MAULE J.

REGINA *v.* the Tithing of WESTMARK.WELLS,
August 13.

THIS was an indictment for the non-repair of a road, which stated that there was and is, within the said tithing, a certain common king's highway for all the subjects, &c. at all times to pass and repass with horses, carriages, &c.; and that the said highway was out of repair, and that the inhabitants of the said tithing of right ought to repair, and from time immemorial had been used and accustomed to repair the said highway.

It was agreed on as a fact, that the way in question had been set out as a private road and driftway under an inclosure act, in the year 1784, for the use of the adjoining owners, who were directed to repair it; and the award, under a power in the act, extinguished all ways, both public and private, not set out in it. The prosecutor's counsel offered to prove that the way had been publicly used before the inclosure, and since had been repaired occasionally by the tithing, and been used to a great extent by the public, and was of great importance.

An indictment for the non-repair of a highway, describing the way as immemorial, is not supported by proof of a highway extinguished, as such, sixty years before, by an enclosure act, but since used by the public, and repaired by the district charged. The 23d section of 5 & 6 W. 4. c. 50. is not retrospective in respect of roads completely public by dedication at the time of the act; it applies to roads then made, and in progress of dedication.

Before the case was gone into by calling witnesses, it was submitted by the counsel for the defendants, that at all events the indictment, in its present form, could not be supported, inasmuch

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as, whatever might be the facts as to the user and repair by the tithing before and since the inclosure, the award extinguished the road as a public way for some time at least, and therefore the allegation of immemorial user and liability to repair could not be supported. It was further urged, that being a private way at the time of the inclosure, it could not be considered as since dedicated to the public so as to bind the parish or tithing to repair, the stat. 5 & 6 W. 4. c. 50. s. 23. having prevented such dedication, without the view of the surveyor and justices, and other forms prescribed. The words of the section "no road or "occupation way *made or hereafter to be made*" have a retrospective operation, and make it impossible that this road could be a highway by dedication.

MAULE J. said, that as to the latter point the statute must have a reasonable construction, and could not be considered to extinguish roads already public by dedication; otherwise, almost all roads not being immemorial, however important and public, would become extinguished; that the term "made," as used in the act, must apply to a road formed or made, but not completely dedicated by user or otherwise, at the passing of the act; but that roads dedicated at that time would be out of the operation of the section. That, on the other point, the indictment clearly failed on the facts, and the jury must acquit the defendants.

Verdict, Not guilty.

Erle and *Bere* for the prosecution.
Bompas Serjt. and *Prideaux* for the defendants.

Burgess. Penzance
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Coram MAULE J.

Bamber. Regina
D. 309.
S. 222 & 1. 279.

REGINA v. The Inhabitants of the Parish of
PAUL.

BODMIN,

August 6.

1. Grant Broughton.
2. M. c. Rob. 444.

THIS was an indictment for the non-repair of a highway, found at the quarter sessions, and removed by *certiorari* into the Queen's Bench at the instance of the defendants. The indictment alleged, that there was and yet is a certain common and ancient highway within the parish of *Paul*, used by and for all the liege subjects, &c., with their horses, coaches, carts, and other carriages, to go, return, pass, ride, and labour, at their free will and pleasure; and that a certain part of the said common and ancient highway, called *Guavas Quay*, situate &c., containing in length &c., was and yet is very ruinous, miry, deep, broken, and in great decay for want of due reparation and amendment of the same, so that &c.

On an indictment for the non-repair of a highway, in the ordinary form, a parish cannot be convicted for not rebuilding a sea wall washed away by the sea, over the top of which the alleged way used to pass. *Reg. v. Karmela. 3/15.*

Where a parish are acquitted on such an indictment, on the ground of there being no highway, the court is not bound to award costs under 5 & 6 W. 4. c. 50. s. 95. A judge who tries at nisi prius an indictment for non-repair, removed by *certiorari*, has no power under that section to award costs.

The way in question led from *Penzance* to *Paul*, crossing, at one part, the sea-shore, over the sand of which people used to go at and about low water, that part of the shore being impassable at and about high water. *Guavas Quay* was a quay of ancient date, built of considerable height against some houses and fish cellars, which it supported and protected against the sea. It was considerably above high water, and of breadth scarcely sufficient for a small fish-cart to pass along. It had been built by the

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proprietors of the cellars, which were used by them for their trade in storing and drying pilchards, the quay being the access for their carts and casks from the sands to the cellars. The quay was, in fact, a thick wall of solid masonry, and the surface of the quay was composed of large pieces of granite mortared together, and had been used by persons going on foot and horseback, and with the small fish-carts used by the fishermen, at such times of the tide as the sands were impassable; but at and about low water, the way by the sands was more direct, and more frequently used. The surface had never been repaired as a way, and the wall had been several times in living memory washed away, and rebuilt by the owners of the cellars by subscription. Two or three years before the indictment the sea had washed away a considerable portion of the quay, leaving a gap which completely broke off the communication; and the indictment was preferred for not rebuilding that part of the wall, and restoring the communication.

At the close of the case for the prosecution,

Erle, for the defendants, submitted that the defendants were entitled to an acquittal. Even if the passage along the quay had been proved to be both frequent and convenient, this could not be called a highway, which any body could, by allowing the public to use it as a highway, so dedicate as to make a parish liable to repair and rebuild it. Such a liability is limited to the surface of grounds over which the owner allows the public to pass. The quay is an expensive and artificial erection, made

use of when a passage is otherwise impossible. At all events a parish could not be obliged to rebuild the wall, whatever might be the obligation as to the surface. (*R. v. Landulph (a).*) And he mentioned a case in which a parish in Lincolnshire had successfully resisted such a liability to repair a viaduct made across a fen, which had been carried away by the floods. If the parish might be made so liable, an insufficient wall or viaduct might at any time be made, and the public would of course use it; but it necessarily would soon be washed away, and the parish be saddled with the expense of constructing a good viaduct, instead of merely repairing the surface of land, according to their common law liability.

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Bompas Serjt., contrd. If this argument is to prevail, any road, however extensively used and necessary to the public, would be lost, any part of which rested on masonry. If a road be raised in its passage across a valley, and supported by masonry, which gives way after any lapse of time, can it be said that the parish are not bound to repair? The true test is, the user by the public. If so used by permission of the owners, it is dedicated to the public, and becomes a highway.

MAULE J. My opinion is, that upon the language of this indictment the defendants are entitled to an acquittal. In ordinary language this cannot be said to have been, at the time of the default, a highway which the public were prevented from

(a) 1 Moo. & Rob. 393.

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 bitants of the
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conveniently using, for want of due reparation and amendment. It was at one time, at most, a wall or embankment, on the top of which there was a road; and whatever might be the duty of the parish as to a road so in existence and requiring repair, I do not think they are defaulters on this evidence. The interruption of the passage is not from the want of repair, but from the sea having washed away the wall or embankment, and there is no longer any thing for them to repair. I do not think they are liable to rebuild the wall.

Verdict, not guilty.

Bompas Serjt. then applied for costs, under the 5 & 6 *W. 4. c. 50. ss. 94, 95.*, the indictment having been preferred by order of the magistrates under that act.

This was resisted, on the ground that the section only applied to highways, whereas the way in question turned out not to be one; and, secondly, that the case did not come within the statute, having been removed by *certiorari*. And a case of *R. v. Minster* was mentioned, tried before Mr. Baron Gurney, at *Launceston*, in which there was an acquittal on the ground of there being no highway, and that learned Judge refused the order for costs.

Bompas Serjt. contended that the statute was compulsory.

MAULE J. I refuse the order, as far as I have any discretion in this matter; but if it be really

compulsory, I give you leave to apply to the Court ; and if they think I ought to make the order, I will do it.

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No motion was afterwards made in the case. (a)

Bompas Serjt. and *Cockburn* for the prosecutor.
Erle, *Moody*, and *Butt*, for the defendants.

(a) The same question arose again before the learned judge in the case of *The Queen v. The Inhabitants of Challicombe*, tried at *Exeter*, at the summer assizes, 1841. The jury having in that case acquitted the defendants on the ground that there had not been any sufficient dedication of the way to the public to constitute it a public highway, *Bere*, for the prosecution, applied for an order for costs under 5 & 6 W. 4. c. 50. s. 95. He contended that the indictment having been preferred by order of the magistrates in petty sessions, the statute was imperative on the learned judge to award costs.

This was opposed on the ground that the statute only applied to cases of real highways found to be such by the verdict ; and secondly, that it did not apply to cases removed by *certiorari*. And *R. v. Paul* was mentioned.

MAULE J. My opinion is on both grounds that I ought not to make the order. I think I have no jurisdiction to award costs when it is found not to be a highway. I have acted on this opinion in a case on the Northern Circuit. I then thought there was so much doubt that I ought to give the parties the benefit of an application to the Court above ; but on mentioning the matter to some of the judges, they thought this could only be done by making the order, which would put the inhabitants in a position that they ought not, according to my opinion, to be placed in, and that I ought not to make the order.

The order was therefore refused. (b)

(b) See *Regina v. Inhabitants of Preston*, 2 Moo. & Rob. 137. ; 7 Dowl. P. C. 593. S. C., by the latter of which reports it appears that the court of Queen's Bench has power to award costs to the prosecutor under this stat., although the indictment has been removed from the quarter sessions by *certiorari*.

CASES
ARGUED AND DECIDED
AT NISI PRIUS
IN
Q. B. C. P. AND EXCHEQUER,
AT THE SITTINGS AFTER
MICHAELMAS TERM,
4 VICT. 1840.

QUEEN'S BENCH.

1840.

GUILDHALL,
Dec. 12.

TALBUTT v. CLARK and Another.

In an action against the editors of a newspaper for libel, the fact of the libel being published on the communication of a correspondent is not admissible in mitigation of damages.

CASE for libel contained in a newspaper, of which the defendants were the editors.

The plaintiff held the situation of clerk of the Eastern Counties Railway Company, at *Rumford*; and the publication complained of was a statement (professing to be inserted in the newspaper on the authority of a correspondent of the defendants), that the clerk at that station (thereby meaning the plaintiff) had overcharged a passenger.

The pleas were, not guilty, and a justification of the truth of the statement.

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Thesiger, for the defendants, after proving certain facts in support of the plea of justification, offered to put in evidence a letter from the correspondent, with his name subscribed, on the authority of which the defendants had inserted the statement, they having refused to insert it without the name; and he contended that this evidence was admissible in mitigation of damages.

Sir *F. Pollock* objected to the evidence.

LORD DENMAN C. J. The evidence certainly does not go to prove any of the issues; and I do not think it admissible. The justification depends on the facts, not on the statement of them by a third party. I know that in a case in the Common Pleas it has been held that a previous statement in another newspaper is admissible; but even that decision has been very much questioned.

The evidence was rejected.

Verdict for the plaintiff.

Sir *F. Pollock* and *Martin* for the plaintiff.

Thesiger and *Godson* for the defendants.

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COMMON PLEAS, WESTMINSTER.

Dec. 4. & 5.

FRANK v. FRANK.

On an issue from the Court of Chancery to try whether *A. B.* was at a certain time of sound mind, the plaintiff affirming the soundness is entitled to begin.

In such issues it will be presumed that the party ordered to be plaintiff was intended to begin.

THIS was an issue directed by the Master of the Rolls, to ascertain "whether the Rev. *Edward Frank*, deceased, was at the time of the execution of a certain deed of feoffment, in the month of *April*, 1816, of sound mind, memory, and understanding, so as to be sufficient for the government of himself, his houses, messuages, lands, and tenements." There were other issues to ascertain whether he was of sound mind, &c. at the times of the execution of certain other deeds, and of the suffering a certain recovery in the Court of Common Pleas.

The issues were in the common form; the plaintiff (who claimed under the deeds) averring that the said *Edward Frank*, at the time of the execution, &c., was of sound mind, &c. The defendant (the heir at law) by his plea alleged that the said *Edward Frank*, at the time of the execution, &c., was *not* of sound mind, &c.

Talfourd Serjt., for the defendant, submitted, that he was entitled to begin. In point of form, he admitted, the affirmative was with the plaintiff; but the law presumes every one to be of sound mind until the contrary is shown. In substance, therefore, the *onus probandi* is on the

defendant, for he must make out the incompetency of the party at the time he executed the deed; and if he does not, the verdict must pass for the plaintiff.

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ERSKINE J. This is an issue directed by the Master of the Rolls, for the purpose of informing his conscience on this particular question, viz. the sanity or insanity of the feoffor at the time the deed was executed. He has directed the party who claims under that deed to be the plaintiff, and has thereby in effect directed that the *onus probandi* shall lie on him. It is reasonable to presume that the learned Judge thought that a *prima facie* case of insanity had been made out, sufficient to call for an answer from the party who set up the feoffment; and I therefore think he is entitled to begin. (a)

The plaintiff accordingly began.

Verdict for the plaintiff.

Jervis, *Channel Serjt.*, and *W. H. Watson*, for the plaintiff.

Talfourd Serjt., *R. V. Richards*, and *Robinson*, for the defendant.

(a) In point of fact, it had been shown in the proceedings in Chancery that in the year 1825 a commission of lunacy had been awarded against *Edward Frank*, and an inquisition returned thereon, which found that *Edward Frank* was then a lunatic, and had been a lunatic from the 31st of *October*, 1815; and in the course of the discussion before Lord *Langdale*, Master of the Rolls, when the issue was directed, his Lordship expressed his opinion that that inquisition raised a presumption

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against the sanity of the feoffor at the time the feoffment was executed in 1816. And it would seem that his Lordship, in consequence of that presumption, thought that the onus of proving the sanity lay on the parties who set up the feoffment against the heir at law. There appears to be no doubt that the inquisition on a writ *de lunatico inquirendo* is admissible in evidence on a trial between third parties touching the sanity of the supposed lunatic (see *Sergeson v. Sealy* (a), *Faulder v. Silk* (b), *R. v. Bowles* (c); and its effect, when received in evidence, is to raise a presumption that the party was a lunatic at the time stated by the inquisition, and that he *continued* lunatic afterwards. For though the first presumption of law is that every man is sane; yet if he be shown to be once insane, the presumption then is that he continues insane; *semel furibundus, semper furibundus præsumitur*. (*Attorney-General v. Parnter* (d).) The presumption, however, of insanity, from the fact of the inquisition having found a party to be in that state, is (as Lord *Langdale* M. R. stated in the principal case) “a very slight presumption,” though sufficient to shift the burthen of proof on those who dispute the insanity. In the principal case, as well as in the much-contested case of *Beer v. Ward* (tried before Lord C. J. *Dallas*, at the sittings after Mich. T. 1821), the commission and inquisition were received in evidence without objection; and in both, the order of the Lord Chancellor directing the commission to issue was also put in.

(a) 2 Atk. 412.

(b) 3 Camp. 126.

(c) Stark. on Ev. 252.

(d) 3 Brown's C. C. 441.; and see Stark. on Ev. 1702.

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JOSEPH SMITH v. MONEYPENNY. .

WESTMINSTER,
Dec. 8.

ASSUMPSIT by indorsee against acceptor of a bill of exchange, drawn and indorsed by one *Thomas Smith*.

Pleas (amongst others), that the said *Thomas Smith* did not draw the bill; also, that he did not indorse it: whereupon issues were joined.

The plaintiff was unable to give any evidence in support of these issues, except the following:— The plaintiff's attorney swore that, after the action was brought, a party calling himself Mr. *Thomas Smith* (but whom the witness did not know, nor had he seen him before or since) called at his office, ostensibly on the subject of the bill of exchange in question: that the witness asked him to write his name, which he did accordingly several times write: that the witness thereby became acquainted with the handwriting of that party; and he believed that the signature at the foot of the bill as drawer, and on the back of it as indorser, was in the handwriting of that individual, whoever he might be.

In an action against the acceptor of a bill of exchange purporting to be drawn and indorsed by *A. B.*, proof that the bill was indorsed by the same person who drew it is sufficient, though that person is shown not to be *A. B.*

Talfourd Serjt. objected that no evidence had been given of the existence of any *Thomas Smith*; the witness did not pretend to say that the unknown party was *Thomas Smith*; and the unsolicited appearance of that party at the office of the

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plaintiff's attorney had every appearance of collusion.

Kelly, for the plaintiff, contended that the evidence was sufficient. The defendant, by accepting the bill, admitted it to have been drawn by a *Thomas Smith*; and the witness's evidence proved that it had been indorsed by the same party who drew it: who that party might be, was quite immaterial.

TINDAL C. J. ruled that there was sufficient *prima facie* evidence that the bill had been indorsed by the drawer: if the defendant had witnesses to disprove that fact, he could call them.

The defendant then called witnesses, who swore that in their judgment the bill was drawn by one *Richardson*.

TINDAL C. J. was, however, clearly of opinion that this was immaterial: whether the bill was drawn by *Richardson* or *Thomas Smith*, if it was in fact indorsed by the same party who drew it, that was sufficient to entitle the plaintiff to a verdict on these issues.

Verdict for plaintiff.

Kelly and *W. H. Watson* for the plaintiff.
Talfourd Serjt. and *Humfrey* for the defendant.

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EXCHEQUER OF PLEAS.

SARAH PHILLIPS *v.* WILLETTS and
Others.

GUILDHALL,
Dec. 14. & 15.

THIS was an issue, directed by the Master of the Rolls to be tried, for the purpose of ascertaining "whether one *Susannah Phillips* was the next of kin of one *Anne Davies* in the pleadings in Chancery mentioned, living at the time of the death of the said *Anne Davies*;" and the Judge was to be at liberty to indorse any special matter on the postea. *Sarah Phillips* (the executrix of the last will and testament of the said *Susannah Phillips*) was the plaintiff in the issue; and *Benjamin Willetts* (administrator of *Hannah Willetts*), and *George Cooper* (administrator of *Thomas Cooper*), and *Betty Collins*, and others, the defendants.

In the course of the plaintiff's case it appeared that the two defendants *Willetts* and *Cooper* (for whom *Erle* appeared) relied on a pedigree, which, if correctly established, would show that their intestates stood in the same degree of relationship to *Anne Davies* that *Susannah Phillips* did; and consequently that if both the plaintiff and the defendants *Willetts* and *Cooper* made out their respective cases, they would have a right to share the residuary estate of the deceased. But it further appeared that the

On the trial of an issue directed by the Court of Chancery, to try whether the plaintiff was the next of kin of *J. S.* (with the usual order for indorsing any special matter on the record,) one defendant, *A. B.*, claimed to be as nearly related to *J. S.* as the plaintiff was; the other defendant, *C. D.*, set up a claim inconsistent with the cases both of the plaintiff and *A. B.* Held, that at the close of the plaintiff's case, *C. D.* should not only open but prove his case, and that then *A. B.* should do the like, the plaintiff having the general reply on both.

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case set up by *Betty Collins* and the other defendants (for whom *Platt* appeared) was quite adverse, as well to the case of the plaintiff as to that of the two defendants *Willetts* and *Cooper*, and would, if established, defeat them both by showing a nearer relationship.

The plaintiff's case being closed, *Platt*, for the defendants (other than *Willetts* and *Cooper*), submitted that it would be very injurious to the interests of his clients if he were to be called upon, at the close of Mr. *Erle's* address for *Willetts* and *Cooper*, to open the case of *Betty Collins* and the other defendants, and then that the evidence of *Willetts* and *Cooper* should be gone into, leaving the evidence of his (Mr. *Platt's*) clients to follow that of *Willetts* and *Cooper*. Though this might, perhaps, be admitted to be the general course of practice where defendants (standing substantially on the same ground) appeared by different counsel, in a case of this kind it would be obviously most unfair and inconvenient; for the result would be, that the observations with which he should have to introduce and explain the course of evidence to be adduced for his clients would be wholly lost upon the jury, whose attention would be directed, immediately after hearing his opening, not to the evidence to which such opening applied, but first of all to the entirely conflicting case of the defendants *Willetts* and *Cooper*. He therefore proposed that Mr. *Erle* should first open, and prove, the case of the defendants *Willetts* and *Cooper*; and then that he, *Platt*, should open, and prove the case of the other

defendants, — Mr. *Kelly* having the general reply on both.

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Kelly, for the plaintiff, insisted that there was no precedent for such a course of proceeding as that now proposed. If one set of defendants were allowed to lie by in this way, and make no statement of their case until the close of a co-defendant's case, it would lead to much inconvenience and abuse. The last defendant would shape his case according to the course which that of the other defendants might take. The ordinary course was to let the senior counsel for the defendants open his case, and then the counsel for the other defendants; and after all the opening speeches were concluded, to commence the evidence. Besides, here, the only issue to be tried was, whether *Susannah Phillips* was the next of kin of *Anne Davies*. All the defendants denied that; and their case was therefore only one.

Erle said that the course suggested by Mr. *Platt* was not without precedent; for that it had in fact been pursued in a case tried at *Salisbury* a few years ago (*Wynne v. Wynne*), where Mr. Serjeant *Wilde* came down specially to conduct the case of an heir at law, while Sir *W. Follett* appeared for one party claiming by devise; and he, *Erle*, appeared for another party, who set up a different will. In that case, after *Wilde* had finished the plaintiff's case, Sir *W. Follett* opened and proved the case of his client; and then he, *Erle*, pursued the same course on behalf of his client.

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ALDERSON B. I certainly think it would be more satisfactory to the ends of justice that each set of defendants should have an opportunity of stating and proving his case, without being interrupted by that of the other set of defendants. Substantially the plaintiff's case, and the case of Mr. *Erle's* clients, are equally inconsistent with that set up by Mr. *Platt's* clients. They happen to be co-defendants on the record : but for all practical purposes the case of *Willetts* and *Cooper* is more opposed to that of Mr. *Platt's* clients than it is to that of the plaintiff; with whom, if the plaintiff's case be made out, and theirs be made out, they stand in equal degree of relationship towards the party deceased. It is true there is but one issue on the record; but then there is the usual order for special matter to be indorsed on the postea; and if Mr. *Erle's* case be made out, I should have to indorse on the postea that though the verdict passed for the plaintiff, *Willetts* and *Cooper* had established that they stood in equal degree of relationship towards *Anne Davies* with *Susannah Phillips*. I think, therefore, that Mr. *Platt* (whose case is the one most completely opposite in interest to that of the plaintiff) should now open the case for his clients, and bring forward his evidence; then that Mr. *Erle* should open and prove the case for the two defendants *Willetts* and *Cooper*; after which Mr. *Kelly* may reply generally on both.

This course was accordingly pursued; *Platt's* witnesses being cross-examined first by *Erle* (on the part of *Willetts* and *Cooper*), and then by *Kelly*

for the plaintiff; and *Erle*'s witnesses were in like manner cross-examined first by *Platt*, and then by *Kelly*.

Verdict for the plaintiff.

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Kelly, Ball, and Bramwell, for the plaintiff.

Erle and *Wordsworth* for the defendants *Willetts* and *Cooper*.

Platt and *Humfrey* for the other defendants.

CASES
ARGUED AND DECIDED
AT NISI PRIUS
IN THE COURTS OF
QUEEN'S BENCH AND EXCHEQUER,
AT THE SITTINGS AFTER
HILARY TERM,
4 VICT. 1840.

QUEEN'S BENCH.

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GUILDHALL,
Feb. 17.

SYDNEY v. BELCHER and ISAACS.


The official assignee of a bankrupt is liable to the costs of defending an action brought against him and the creditors' assignee, if he joined in retaining the attorney.

ASSUMPSIT for work and labour done by an attorney.

Plea, *non-assumpsit*.


The bill of costs for which this action was brought was incurred in the defence of an action by *Alexander Isaacs* against the defendants, who

were the assignees of *Philip Isaacs*, a bankrupt. *Belcher* was the official assignee, and the defendant *Isaacs* (who was the brother of the plaintiff in that action) was the assignee elected by the creditors. There was some evidence of an express retainer by *Belcher* of *Sydney*, the plaintiff, to appear and defend the action ; but it was contended there were other circumstances to show that the plaintiff, knowing *Belcher* to be the official assignee, looked to the estate for payment, and not to the personal liability of *Belcher*.

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Erle, for the defendant *Belcher*, relied on the act of parliament 1 & 2 W. 4. c. 56., and read particularly s. 23., contending that the defendant, being merely a public officer compellable by his duty to act in protection of the bankrupt's estate, and having no right to appoint the attorney, was not liable for the costs incurred by him ; and that at all events, in this case, the attorney did not in fact act on his credit and retainer.

Lord DENMAN C. J. in summing up, told the jury that the question for them was, whether both and each of the defendants had agreed to employ the plaintiff as their attorney in the joint defence of the action. If they did, the verdict must be for the plaintiff. That there was nothing in the act of parliament to exempt the assignee from liability under such circumstances. That there might be a mode of doing business by which the official assignee might protect himself, but it was for the jury to say whether such mode had been adopted in this case. If the jury thought that he had given

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the plaintiff to understand he would be liable, they would find a verdict for the plaintiff.

Verdict for the defendants.

R. V. Richards and *Whateley* for the plaintiff.

Erle for the defendant *Belcher*.

Ball for the defendant *Isaacs*.

A rule to show cause why the verdict should not be set aside, and a new trial had, has since been granted, on the ground that there was no evidence to go to the jury to show that the plaintiff agreed to look to the estate for payment of his bill. That rule is still pending.

GUILDHALL,
 Feb. 22.

HORN v. BENSUSAN.

Indebitatus assumpsit will not lie for demurrage, unless there be an express contract to pay it.

INDEBITATUS ASSUMPSIT. The first count was for freight; the second, for the use of a certain ship or vessel (to wit) the *Elbe*, whereof the plaintiff was the owner, by the defendant, before that time retained and kept on demurrage, with certain goods on board thereof, for a long space of time then elapsed, at his request. There were also counts for money paid, and on an account stated.

Pleas: as to 39*l.* 7*s.* 6*d.* tender before action brought; as to the residue, *non-assumpsit*.

The ship was engaged by the defendant to take a cargo of coals from *Newcastle* to *Marseilles*, and bring a cargo of linseed from thence to *London*. The

plaintiff signed and sent to the defendant a charter-party, by which it was stipulated that thirty running days were to be allowed for loading and discharging, and ten days on demurrage, at 4*l.* per day. But before the defendant executed the charter-party, he altered it by inserting thirty-five running days instead of thirty; and then delivered it to the plaintiff's captain, who set sail and took it with him, neither the plaintiff nor the captain being aware of the alteration. The actual tender of the 39*l.* 7*s.* 6*d.* could not be proved: but the sum alleged to have been tendered by the defendant before action brought was sufficient to cover the balance for freight and demurrage, supposing the defendant to be entitled to thirty-five running days; and the action was in fact continued for the recovery of 20*l.*, being 4*l.* per day demurrage for the five days in dispute.

The plaintiff was unable to show any binding contract between the parties; and thereupon

Sir *John Campbell* A. G. insisted that the plaintiff had a right to recover demurrage for all the days that the ship had been detained by the defendant beyond what would be a reasonable time for loading and discharging the ship; and he proposed to call evidence to show that thirty days were a reasonable time for that purpose.

Thesiger and *Gurney*, *contra*. If the plaintiff has not evidence of an express contract, he cannot recover in this form of action. *Indebitatus assumpsit* will not lie for demurrage, unless there be a distinct agreement for it.

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PARKE B. (a) I am clearly of that opinion. If the defendant has detained the ship longer than the usage of trade authorises, the plaintiff has his remedy by a special action; but it has been held that *indebitatus assumpsit* will not under such circumstances lie.

The plaintiff being unable to prove any express contract, there was a

Verdict for plaintiff on plea of tender, 1s. damages; and for defendant on second plea.

Sir J. Campbell A. G. and Hoggins for the plaintiff.

Thesiger and *R. Gurney* for the defendant.

(a) The learned Baron sat in this Court under the provisions of the stat. 11 G. 4. and 1 W. 4. c. 70. s. 4., the Judges of this Court being all in attendance in the Exchequer Chamber on a writ of error.

GUILDHALL,
 Feb. 26.

RAWLINS, Knight (one of the Directors of the Eagle Insurance Company) v. DESBOROUGH (Secretary to the Atlas Assurance Company).

1. A party whose life is insured is not the general agent for the assured: and therefore the policy is not void by reason that such party failed to communicate a material fact, as to which he was not interrogated by the insurers, unless he was aware of the materiality of the fact, and studiously concealed it.

2. It is a question of fact for the jury whether a fact, not communicated, was under the circumstances one which the assured ought to have communicated.

3. Where the affirmative of any one material issue is on the plaintiff, and he undertakes to give evidence upon it, he is entitled to begin.

ASSUMPSIT on a policy of insurance, dated 24th September, 1834, on the life of *John Cochrane*, for the term of four years. There were also the usual

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money counts, and a count upon an *insimul computassent*. (a)

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The first and second pleas to the first count alleged that a certain declaration made by one *Bumstead*, who proposed the insurance, on behalf of the *Eagle* Company, as to the health of Mr. *Cochrane*, and that he was then in good health, &c. was false. The third and fourth pleas alleged, in substance, that the *Eagle* Insurance Company, in answer to the usual questions (b) put when the insurance was proposed, referred the *Atlas* Company to Mr. *Bennett* and Mr. *Neale*, respecting the then present and general state of health of Mr. *Cochrane*; that those referees gave certain answers, set out in the pleas, alleging, amongst other things, that the habits of Mr. *Cochrane* were, as far as the referees knew, temperate; that those answers were false, and that the referees knew them to be so.

5thly, That the *Eagle* Company did not communicate to the *Atlas* Company a certain fact, within their knowledge, material to be communicated, and which they ought to have communicated; viz. a certificate given by the medical officer of the *Economic* Insurance Company, touching the health and apparent habits of Mr. *Cochrane*, on the occasion of the *Eagle* Company having proposed the insurance to the *Economic* Insurance Company.

6thly, That the *Eagle* Company did not communicate to the *Atlas* Company a certain fact within their knowledge, material to be communicated,

(a) See the form of the declaration, *antè*, p. 70.

(b) See the form set out in *Everett v. Desborough*, 5 Bing. 503.

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and which ought to have been communicated; viz. that Mr. *Cochrane* was addicted to habits of intemperance in liquor.

Lastly, to the money counts, and the count on the *insimul computassent*, *Non-assumpsit*.

The replication traversed the special pleas, and joined issue on the *non-assumpsit*.

The verdict on the former trial of this action (a) having been set aside by the Court, and a new trial awarded, the cause now came down again to be tried.

Kelly, for the defendant, insisted that he was entitled to begin. He said that on the former trial the plaintiff had been allowed to begin, on the ground that the affirmative on the two first pleas lay on him; but the defendant now offered to give up those pleas, and to confine his defence to the other issues, as to which the affirmative was with the defendant.

The *Attorney-General* denied that it was competent for the defendant to do this at the very instant of the trial, and merely to gain the right of beginning. But he further said that there was an issue on the count upon the *account stated*, on which he undertook to give evidence; for the *Atlas Company* had, in the first instance, written a letter acknowledging the justice of the claim, and promising to settle it. This alone entitled the plaintiff to begin.

(a) Vide *antè*, p. 70.

Lord DENMAN C. J. On referring to my notes of the former trial, I observe that a letter was put in evidence, written by the secretary of the *Atlas* Company, having very much the effect stated by the *Attorney-General*; but I am disposed to go further, and to hold that wherever there is a material issue on the record upon which the plaintiff asserts that he means to give evidence, he is entitled to begin.

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The *Attorney-General* accordingly began.

There was a great body of evidence as to the intemperate habits of Mr. *Cochrane*, and as to the probability that the two referees knew that he was addicted to the immoderate use of spirits. As to the fifth plea, it appeared that the *Eagle* Company, having agreed to advance a large sum of money to Mr. *Cochrane* on the security of some property in which he had a life interest, in order to diminish their own risk proposed to various offices to effect insurances on his life in various sums. Amongst other offices, they proposed an insurance to the *Economic* Insurance Company. The secretary of that company called at the office of the *Eagle* Company, declining the insurance, and showing (as a reason) a communication which their medical adviser, Mr. *Travers*, had made to the resident director on the subject of *Cochrane's* insurance. It was in the form of a note to the resident director of the *Economic* Company, stating that he (Mr. *Travers*) had just visited Mr. *Cochrane*, and describing his person; that his appearance was that of a person who had been drinking; that his habits were those of a low *roué*; that he (Mr. *Travers*) believed his organs were sound, and he should think that

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drinking was at present an unconfirmed habit; and concluding thus, "The sum is large, but the term is short (four years). He is in more danger from his moral than his physical state at present; but I cannot view them in connection without apprehension. The other offices have not hesitated; you must decide." It was admitted by the plaintiff that this fact was not communicated to the *Atlas* Company; but there was conflicting testimony as to whether it had been communicated to the *Eagle* Company themselves before the present policy was effected; and the plaintiff insisted that even if it had been, it was not a fact which they were called upon to communicate. Mr. *Travers*'s note did not contain the statement of any fact, but merely the hasty expression (confidentially imparted) of the writer's opinion, and that obviously formed on mere hearsay. It was further contended by the defendants that they were at all events entitled to a verdict on the sixth plea, the evidence of *Cochrane*'s habitual intemperance being (as the defendants' counsel insisted) irresistible; and that even if *Bennett* and *Neale* could be supposed ignorant of such a fact, *Cochrane* himself must have known it, and was bound to communicate it to the defendants when he appeared before the directors; that he was the general agent of the assured, and that they were responsible for what he wrongfully did, or wrongfully omitted doing, in relation to the insurance; and for this purpose *Everett v. Desborough (a)*, and *Maynard v. Rhodes (b)* were cited.

(a) 5 Bing. 503.

(b) 5 Dowl. & Ry. 266. See also *Huckman v. Fernie*, 3 M. & W. 505.

The LORD CHIEF JUSTICE, in summing up the the case to the jury, after stating that it was the duty of a party effecting an insurance to communicate to the insurers every material fact within his knowledge tending to increase the hazard, or to affect the question of the life being an eligible or proper object of insurance, left the jury to say, as to the third and fourth pleas, whether the habits of *Cochrane* were intemperate, and whether the referees knew them to be so, as alleged in the pleas. As to the fifth plea, his Lordship left it to the jury to say whether Mr. *Travers*'s letter had been communicated to the *Eagle* Company before the present policy was effected ; and whether, if so, it was a circumstance, which, in the judgment of the jury, was material to be communicated, and which ought to have been communicated by them to the *Atlas* Company, with reference to the insurance. In regard to the issue on the sixth plea, his Lordship told the jury that, in his opinion, the doctrine contended for by the defendants' counsel, that the party whose life was insured was the general agent of the assured, and that the latter was responsible for all the acts of such party connected with the insurance, had been greatly overstrained. He is to answer all questions put to him ; and if he answers them falsely, that will vitiate the policy. Or even if, without being distinctly interrogated as to his habits, the jury thought that he was aware of them, and, knowing their importance, studiously concealed them from the insurers ; in that case, his Lordship advised them to find the issue on the sixth plea for the defendant. But the mere non-communication of his habits of life by the party

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whose life was insured, would not in itself vitiate the insurance, even though those habits were in the opinion of the jury such as tended to shorten life.

The jury found a verdict for the plaintiff on all the points left to them. (a)

Sir *J. Campbell* A. G., Sir *F. Pollock*, and *Robinson*, for the plaintiff.

Kelly, *R. V. Richards*, and *W. H. Watson*, for the defendants.

(a) Considering the vast extent to which the practice of life insurance is now carried, it is to be regretted that the law is at present in so uncertain and unsatisfactory a state, as it regards the points discussed in the principal case.

The question whether the policy may be avoided in consequence of false or imperfect statements, made by persons to whom the insurers are referred, respecting the health and habits of the life insured, or in consequence of the suppression of facts by those referees, may, of course, depend in each case very much on the language of the policy. In some instances it may be provided by the terms of the policy, that it shall be effectual only on condition that the declarations of the referees are in all respects true; while in most policies no such proviso is found. Hence necessarily arises considerable difficulty in laying down any general rule for ascertaining how far the interests of the assured may be affected by the conduct of his referees.

In most cases it is required that the person intending to effect an insurance shall previously sign a declaration, containing answers to certain specific questions as to the age and health, &c. of the party whose life is intended to be insured; and amongst the questions he is required "*to give the names and residences of two gentlemen to be referred to respecting the present and general health of the life to be insured, one to be the usual medical attendant of the party.*" And in the policy,

and frequently in the declaration itself so signed, it is provided, "that a declaration as to all the above points is to be considered as the basis of the contract; and that if such declaration be not in all respects true, the policy will become void." Such was the form of the instruments in the principal case. (a) What, then, is the extent of this warranty? It is clear that in its terms it reaches only the declaration made by the party proposing the insurance. If any thing which he represents to the company be untrue, he is to forfeit the benefit of the policy. If, therefore, he refers the company for information respecting his health to persons who are not able to give such information; or if he represents one of the referees to be his usual medical attendant, when in fact he is not: in either of these cases the declaration made by the assured is untrue, and the policy therefore void. (*Everett v. Desborough* (a), *Huckman v. Fernie* (b).) But there would seem to be nothing in the language of the policy making the assured responsible for the conduct of his referees. Is there, then, any thing in the nature of the contract itself, or in the relation in which the parties stand towards each other, which should carry the responsibility of the assured for the conduct of his referees further than the words of the contract seem to extend? It is submitted there is not. It is sometimes, indeed, contended that the referees are the agents of the assured, and that he is on that ground liable for the consequences of their falsehood or negligence; but this appears a very forced construction. It might as well be contended that when a servant, applying to be hired, is asked for the name of his former employer, and gives it truly, such former employer is to be considered the agent of the servant. It seems a more natural and just conclusion to hold that, in both instances, the referee is a middle-man, the agent of neither party; but himself liable for the consequences of any falsehood of which he may be guilty. The only reported case which appears, at first sight, inconsistent with this view of the law, and to make the assured liable for the misrepresentations or concealments of his referees, is that of *Lindenau v. Desborough*. (c) The policy was there in the same form as in the principal case; and no communication having been made, either by the assured or by his re-

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 v.
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(a) See the form in *Everett v. Desborough*, 5 Bing. 503.

(b) 3 M. & W. 505. (c) 8 B. & C. 586.

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referees, of a fact (proved on the trial to be material) respecting the health of the life insured, the policy was holden to be on that ground void: and if the fact concealed had not been known to the assured, but only to the referees, the question must have arisen whether the assured be responsible for the concealment of facts by the referees. But it does not appear from the report in what relation the plaintiff himself stood towards the life insured, or what knowledge he had of the fact not communicated; and it seems to have been assumed that he *did* know the fact: for Lord *Tenterden* C. J. says he should have directed the jury to find for the defendant, if they "thought the plaintiff had failed to communicate to the insurers any material circumstance *within his knowledge*." It is conceived, therefore, that this case does not at all go the length of establishing that (in the absence of any express condition to that effect) the policy can be avoided by reason of the referees not communicating a material fact, that fact not being within the knowledge of the assured.

The other question discussed in the principal case, viz. whether the party whose life is insured be the agent of the assured, and whether the assured be responsible for what that agent falsely states, or wrongfully omits to state, to the insurers, is scarcely ever provided for by the terms of the policy, and would therefore seem to admit more readily of some general rule. It is almost always required that the party whose life is insured shall attend at the office of the insurers to be examined; and it may perhaps be admitted that to a certain extent that party becomes the agent of the assured: the difficulty, then, consists in defining the limits within which he is to be considered as holding that character. If he is to be treated as the *general* agent of the assured for the purpose of effecting the insurance, it seems difficult to escape from the conclusion that if he fail to communicate to the insurers every fact, within his knowledge, material to the subject matter of the contract, the policy will be void as against the principal (*Fitzherbert v. Mather* (a), *Shirley v. Wilkinson* (b)), even though the agent might have been ignorant of the materiality of the fact not so communicated (*Ib. Bufe v. Turner* (c), *Lindenau v. Desborough* (d), *Rickards v. Murdock* (e).)

(a) 1 Term R. 12. (b) 1 Dougl. 806. n. (c) 6 Taunt. 338.
 (d) 8 B. & C. 586. (e) 10 B. & C. 527.

But if the doctrine of the agency can be carried thus far, it is obvious that no man can effect an insurance on the life of another without the most fearful risk that his insurance will be void. Every man has *knowledge* of sensations and appearances in his bodily system which are for ever unknown to others, and which pass away without producing even in his own mind the slightest alarm, or seeming to him of the slightest importance; yet, to a person experienced in the diagnostics of disease, these very sensations and appearances may convey the suspicion, or even the certainty, that the constitution has a tendency to some fatal malady. They are therefore facts in themselves material to be communicated; but can it be endured that the policy shall be declared void because the party whose life is insured failed, under such circumstances, to communicate those facts to the insurers? The same question may, of course, arise in regard to the *habits* of the party. The more reasonable rule to be laid down would appear to be this — that the party whose life is insured is to be considered the agent of the assured, for the purpose of answering all such questions as are put to him, and of communicating to the insurers such facts, within his knowledge, as he at the time believes to be material; and, notwithstanding the more general terms in which the doctrine of agency has sometimes been contended for (*a*), the Courts appear now disposed to restrict the doctrine in the way suggested. In *Huckman v. Fernie* (*b*), indeed, the point was decided upon the form of the plea, which was held to import that the assured had *personal* knowledge of the fact (see the judgment of the Court delivered by Lord Abinger C. B., p. 518.); but it is clear that the Court inclined strongly to the opinion that the party whose life was insured was only the agent of the assured, for the purpose of answering such questions as the office chose to put to her. In *Maynard v. Rhodes* (*c*), and in *Morrison v. Muspratt* (*d*), the doctrine of agency was not at all adverted to. In *Maynard v. Rhodes* the Court only decided that the life insured having concealed from the office a disorder of long standing, and which eventually produced death, the policy was

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(*a*) See *Everett v. Desborough*, 5 Bing. 514.; *Huckman v. Fernie*, 3 M. & W. 515.

(*b*) 3 M. & W. 505.

(*c*) 5 Dowl. & R. 266.

(*d*) 4 Bing. 60.; S. C. 12 Moore, 266.

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thereby void. The report of the case is very scanty; but it may be inferred from the circumstances stated, that the party must have been aware of the disease, and of its materiality as a fact to be communicated. It is difficult to collect from either of the printed reports of *Morrison v. Muspratt* what opinion the Court expressed, or whether they expressed any opinion, on the effect of the non-communication by the life insured of her recent illness. The case appears to have been sent down to a second trial mainly on the ground of a misrepresentation, apparently fraudulent, as to the usual medical attendant; and from that misrepresentation a jury might reasonably have inferred that in concealing the fact of the disease itself, for which the medical attendant was called in, the life insured had studiously concealed a fact which she knew to be material. In the case of *Sweet v. Fairlie* (a), the Lord C. J. DENMAN directed the jury, that if they thought the party whose life was insured might from the nature of the disorder have been unconscious of it, his non-communication of it would not vacate the policy.

On the whole, therefore, it is apprehended that there is no decision of the Courts inconsistent with the opinion expressed by the Lord Chief Justice in the principal case, viz. that the party whose life is insured is only the agent of the assured for the purpose of answering such questions as shall be put to him by the insurers; and that his non-communication of a material fact, as to which they do not question him, will only vitiate the policy if he knew of that fact, and believed it to be material.

(a) 6 Carr & P. 1.

SPRING ASSIZES, 4 VICT.

NORTHERN CIRCUIT.

YORK.

Coram MAULE J.

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YORK,
March 12.

REGINA v. HOLROYD.

INDICTMENT on the statute 3 & 4 *Vict. c. 97. s. 15.*
 (a) for placing obstructions on the *Leeds and Manchester* Railway. The indictment charged "that
 " the defendant *unlawfully and wilfully* placed, cast,
 " and threw, and aided and assisted in placing, cast-
 " ing, and throwing in and upon the rails and
 " below the rails of a certain railway constructed
 " under the powers of a certain act of parliament
 " passed in 1836, and intituled ' An Act for making
 " a Railway from *Manchester to Leeds*,' and of a
 " certain other act of parliament passed in 6 *W 4.*,
 " intituled ' An Act for enabling the *Manchester*
 " and *Leeds* Railway Company to vary the Line of
 " such Railway,' &c., and of a certain other act, &c.,
 " and intended for the conveyance of passengers
 " in and upon carriages drawn and impelled by the
 " power of steam, divers, to wit, five wooden bar-
 " rows, five barrow loads of stone, and five barrow
 " loads of earth, in such manner as to obstruct the
 " engines and carriages using the said railway, and
 " to endanger the safety of persons conveyed in

A party is
 liable to be
 indicted under
st. 3 & 4 Vict.
c. 97. s. 15. if
 he designedly
 places on a
 railway sub-
 stances having
 a tendency to
 produce an
 obstruction of
 the carriages,
 though he may
 not have done
 the act ex-
 pressly with
 that object.

(a) Lord *Seymour's* act.

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“and upon the same, against the form of the
“statute,” &c.

Plea, not guilty.

It appeared that the railway company, acting under the ninety-fourth section of the statute 6 *W.* 4. which empowered them “to alter the course of
“any rivers or streams of water, roads or ways, in
“order the more conveniently to carry the same
“over or under, or by the side of the said railway,” had diverted an ancient highway, carrying it over the railway by a bridge, at a point different from that at which, according to its original line, it would have crossed the railway.

The defendant (who lived close to the diversion) had indicted the company for making it — contending that it had not been made in conformity with the act of parliament—and disputes had arisen in consequence between them. Whilst those disputes were going on, large quantities of earth and rubbish were found placed across the railway at the point of diversion. The prosecutors’ case was that this had been done by the defendant, or by persons acting under his orders, wilfully, and in order to obstruct the use of the railway; and the defendant’s case, on the other hand, was, that his men in the course of emptying barrows of earth and rubbish into a ditch near the railway, had accidentally dropped part of the rubbish on the railway; and it was insisted that at all events there was no evidence to show that the defendant had done the act in order to obstruct and upset the carriages.

MAULE J. in summing up to the jury told them, that if they believed that the rubbish had been dropped on the rails by mere accident, the defendant had not committed an offence within the act of parliament; but, on the other hand, it was by no means necessary, in order to bring the case within the reach of the act, that the defendant should have thrown the rubbish on the rails expressly with a view to upset the train of carriages. If the defendant designedly placed there substances having a tendency to produce an obstruction, not caring whether they actually impeded the carriages or not, that was a case within the act, and the jury were bound to convict.

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The jury retired, and, after being absent some hours, returned, and requested to be informed by the learned judge what was the meaning of the term "*wilfully*" used in the statute.

The learned judge repeated in substance what he had addressed to them in his summing up — telling them, that he should consider the act to have been *wilfully* done, if the defendant intentionally placed the rubbish on the line (knowing that it was a substance likely to produce an obstruction); if, for instance, he had done so in order to throw upon the company's officers the necessary trouble of removing the rubbish; if, on the other hand, the jury thought it had been purely the result of accident, he recommended the jury to acquit the defendant.

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The jury were unable to agree in a verdict, and were ultimately discharged by consent.

Cresswell, Baines, and the Hon. *J. S. Wortley* for the prosecution.

Atcherley Serjt., Addison, and *Watson* for the defendant.

Coram ROLFE B.

LIVERPOOL, HOBSON, Assignee of ASTLEY, a Bankrupt, v.
April 1. MELLOND.

Where a debtor deposits a title deed with his creditor, as security for a debt, the interest which the creditor thereby acquires in the deed may be assigned by him to a third person.

DECLARATION in trover for a deed, alleging the assignee to have been possessed, &c.

Pleas. First, not guilty; second, that the plaintiff was not possessed, &c.

It appeared that *Astley* and one *Sale* carried on trade in partnership, and became bankrupts. *Astley* and *Sale* kept an account with the Imperial Bank of *England* at *Manchester*, and before the bankruptcy *Sale* had deposited with the Imperial Bank a lease made to *Astley* of some freehold property, which was the deed in question in this action. *Mellond* (the defendant) also kept an account, and had money transactions, with the same bank; and on a settlement taking place between the defendant and the

bank, a balance was found to be due to the defendant; and thereupon the bank gave the defendant a cognovit for the amount, and at the same time delivered to him the deed in question, with a memorandum, which (after reciting that such balance was due to the defendant, and that the cognovit had been given,) stated that the Imperial Bank therewith also deposited the deed with the defendant as a collateral security. The plaintiff alleged, first, that *Sale* had placed the deed in the hands of the bank merely for safe custody; secondly, that if *Sale* had in terms deposited it by way of security for a debt, he had no right to do so, and that as against *Astley* and the plaintiff (his assignee) such deposit was invalid; thirdly, that even if a lien had been created in favour of the Imperial Bank, the latter had no right to transfer the deed to the defendant, for a lien is a matter strictly personal; so that by parting with the possession, the Imperial Bank lost their interest in the thing deposited, and the owner had a right to recover it in whose hands soever it might be (*a*); lastly, that in point of fact, at the time of the demand upon, and refusal by, the defendant, there was no debt remaining due from *Astley* and *Sale* to the Imperial Bank.

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v.
MELLOND.

The defendant insisted that the deed had been placed by *Sale* in the hands of the bank, to secure any sums that were or might become due to them

(a) Vide *Legge v. Evans*, 6 Mees. & W., 41, 42,

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from *Sale* and *Astley*; that this was done with *Astley*'s authority; that the bank thereby became interested in the deed, as equitable mortgagees of the estate, and had a right to transfer their interest in the deed to the defendant; and that at the times when the deed was handed over by the Imperial Bank to the defendant, and of the demand and refusal, the former were and still remained large creditors of *Astley* and *Sale*.

ROLFE B. told the jury that in his opinion, if the deed had been deposited by *Astley*, or with his concurrence, in the hands of the banking company, by way of a security for a debt, they thereby acquired an interest in the deed larger than that of a mere lien. In the case of an ordinary lien the deposittee has not, nor is intended to have, the property in the thing deposited; but where a title-deed is deposited, the deposittee has not only an equitable interest in the estate, but a right to call for a legal mortgage; and that right he can transfer to another, in the same way that it was vested in himself, namely, by deposit of the title-deed.

His lordship accordingly directed the jury, that if they found that *Sale* had been authorized by *Astley* to deposit the deed by way of security for a debt, and had in fact so deposited it, and such debt still remained due, they should find the verdict on the second issue for the defendant. But if they thought that *Sale* had deposited the deed with the Imperial Bank only for safe custody, or that he had acted without *Astley*'s authority in depositing it, or that no debt remained due from *Astley* and *Sale* to the Imperial Bank at the time

of the demand and refusal, they should find their verdict for the plaintiff.

Verdict for the plaintiff.(a)

Cresswell and *Tomlinson* for the plaintiff.

Dundas and *Cowling* for the defendant.

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(a) It is, of course, clear that a mortgage of the legal estate may be assigned without the privity of the mortgagor, though such an assignment constitutes a very indifferent security (see the judgment of Lord Chancellor *Loughborough* in *Matthews v. Walkwyn*, 4 Ves. R. 125. 7.; *Williams v. Sorrell*, Ib. 389.; *Jones v. Gibbons*, 9 Ves. 411.); and it appears to have been decided in *Ex parte Smith* (1 Ves. & B. 518.), that the deposittee of a lease (which had been delivered to him by way of security) might transfer the interest which he so acquired to a third person, without the concurrence of the original depositor; for though the transfer in that case was made in pursuance of an agreement between the depositor, the original deposittee, and the transferee (to whom the depositor executed a general assignment of all his effects), yet that transaction was held to be an act of bankruptcy on the part of the depositor, and therefore, so far as regarded him, invalid; consequently, the right of the party claiming under the transfer rested on the act of the original deposittee alone (p. 522.).

Coram MAULE J.

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LIVERPOOL,
April 3.

REGINA v. PARR, BROWN, MILLER, and
HOLBORNE.

Where *A.*, knowing that goods have been stolen, directs *B.*, his servant, to receive them into his premises, and *B.*, in pursuance of that direction, afterwards receives them in *A.*'s absence, *B.* knowing that they had been stolen, they may be jointly indicted for receiving them.

THE indictment charged the two first-named prisoners with feloniously stealing a large quantity of molasses, and the two last-named prisoners with receiving the goods, knowing them to have been stolen.

Parr and *Brown* were porters employed about the docks at *Liverpool*, *Holborne* was a dealer in molasses in the same town, and *Miller* was his servant. It appeared that *Parr* and *Brown* brought the goods to *Holborne*'s warehouse, and left them with *Miller*, who, after some hesitation, accepted them. *Holborne* was at this time absent; but it was clear on the facts that shortly after he came home he was aware of the molasses having been left, and there was strong ground for suspecting that he then knew that it had been stolen; it was also clear that his servant *Miller*, soon after the goods were left with him, was aware they had been unlawfully procured, as he was found disguising the barrels in which the molasses was contained.

Wilkins, for the prisoner *Holborne*, submitted, that as the goods were in the first instance received by *Miller*, in *Holborne*'s absence, the indictment, alleging a joint act of receiving, could not be sup-

ported, even though the jury thought that *Holborne*, when he came in, assented to the unlawful act of his servant, and he cited *Regina v. Messingham*. (q)

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Ellis, for the prosecution, agreed that the objection, if supported by the facts, was, in point of law, a valid one; but he contended that there was some evidence to go to the jury, that *Holborne*, even before he went out, must have been aware that the goods were about to be left at his warehouse, and must have given orders for their reception, and if *Miller* took them in, in pursuance of previous orders from *Holborne*, the prisoners might be convicted of a joint receiving.

MAULE J. thought there was sufficient evidence of this nature, and his Lordship told the jury, that if they were satisfied that *Holborne* had directed the goods to be taken into the warehouse, knowing them to have been stolen; and that *Miller*, in pursuance of that direction, had actually received them into the warehouse, (he, also, knowing them to have been stolen,) they might properly convict both the prisoners.

Verdict, guilty against all the prisoners.

Ellis and *Harden* for the prosecution.

Murphy for *Miller*.

Wilkins for *Holborne*.

The other prisoners were undefended.

Walter & Innes

Coram ROLFE B.

1841.

*323. 2. 2. 78.*LIVERPOOL
April 6.JONES and Another, Assignees of FRANKLIN,
a Bankrupt, v. KEENE.

A policy of insurance on the life of *A.* had been assigned to the plaintiff: the defendant having privately ascertained that *A.* was dangerously ill, treats with the plaintiff for the purchase of the policy for a small sum, representing it as the then value of the policy, the plaintiff not being aware of *A.*'s illness. Held, that the sale was void, and that the plaintiff might recover the value of the policy in an action of trover.

TROVER for a policy of insurance effected with the Britannia Insurance Company for the sum of 999*l.* on the life of one *George Laing*, and bearing date the 21st November, 1837.

Pleas. 1. Not guilty.

2. That the plaintiffs were not possessed,
&c.

It appeared that the plaintiffs had in their possession, as part of the bankrupt's estate, the policy mentioned in the declaration, which had been assigned by *Laing* to the bankrupt before the bankruptcy. In the early part of 1840 the assignees had endeavoured, through their attorney, to sell the policy, and the price they had asked for it was (to the knowledge of the defendant, who was an auctioneer) 40*l.*, but no purchaser could be procured. On the 15th August, *Laing* (who up to that time had enjoyed excellent health) was taken suddenly and alarmingly ill, and on the 20th he died. On the 18th the defendant instructed one *Cook* (an agent for the Britannia Insurance Company) to purchase the policy for him, if it was still in the market, and authorized him to offer as much as sixty guineas for it. *Cook* accordingly called several times upon the attorney of the assignees (who had been em-

ployed by them to effect a sale of the policy), and finding him at last at home, *Cook* asked whether the policy was still in the market. He was answered, that it was; and the attorney asked *Cook* how much he thought it would be worth. *Cook* answered, not more, perhaps, than three fourths of a year's premium (which would amount to about sixty guineas). A bargain was made for the purchase at that sum, and in the course of the afternoon *Cook* again called, with the defendant, whom he introduced as the purchaser for whom he was acting; the defendant then paid down the money, and the policy was handed over to him.

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The plaintiffs gave evidence, that when the defendant on the 18th caused *Cook* to treat for the purchase of the policy, both he and *Cook* were very well aware of the alarming illness of *Laing*, and that he was then in imminent danger; that the plaintiffs had no knowledge whatever of that fact, and treated on the supposition that he was still in good health; and they contended that, under these circumstances, the bargain was a fraudulent one on the part of the defendant, and that therefore no right of property had passed to him.

Alexander, for the defendant, first denied the defendant's knowledge of *Laing's* illness; and, secondly, he insisted, that even if the defendant was aware of that fact, his non-communication of it would not avoid the contract. It was the vendor's own fault, if, for want of due inquiry as to the value of the policy, he sold it for less than it was worth. So it had been held that a person, proposing to

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purchase an estate, was not called upon to disclose to the seller that he had discovered a mine under it. (a)

ROLFE B., in summing up to the jury, said, that if the defendant had privately ascertained the illness of *Laing*, and then treated with the plaintiffs without communicating the fact to them, and they supposing that he was still in good health, there could be no doubt such conduct was grossly dishonourable. But he had no difficulty in going further than this, and telling them, that if they believed the facts as stated on the part of the plaintiffs, the defendant's conduct amounted to legal fraud, and he could not set up any title to the policy so acquired. The jury would say whether, at the time when *Cook* applied to the assignees on the 18th, and when he stated his opinion to be that the policy was only worth 60*l.*, he and the defendant knew the state of extreme danger in which *Laing* was; if they were of that opinion, he recommended them to find for the plaintiffs.

Verdict for the plaintiffs. (b)

(a) See *Fox v. Macreth*, 2 Bro. C. C. 420.

(b) See acc. *Hill v. Gray* (1 Stark. R. 434.) and *Turner v. Harvey* (1 Jac. R. 169.). In the latter case the purchaser of a reversionary interest concealed from the seller the fact of the death of a person, by which the value of the reversionary interest was materially increased. The Lord Chancellor decreed that the agreement for purchase should be delivered up to be cancelled; and though his Lordship laid stress on some special circumstances in the case, Sir *E. Sugden* (in his work on Vendors and Purchasers, vol. i. p. 7. s. 20., and again p. 382. s. 4.) cites the case as establishing his general position, that "if a purchaser

Cresswell, Watson, and John Henderson for the plaintiffs.

Alexander and Crompton for the defendant.

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“conceal the fact of the death of a person, of which the seller
“is ignorant, and by which the value of the property is increased,
“equity will set aside the contract.” See also *Brealey v. Collins*
(You. Rep. 317.).

Coram MAULE J.

REGINA v. JOSEPH HOLLAND.

LIVERPOOL

April 7.

INDICTMENT for murder. The prisoner was charged with inflicting divers mortal blows and wounds upon one *Thomas Garland*, and (amongst others) a cut upon one of his fingers.

Where a wound is wilfully, and without justifiable cause, inflicted, and ultimately becomes the cause of death, the party who inflicted it is guilty of murder, though life might have been preserved if the deceased had not refused to submit to a surgical operation.

It appeared by the evidence that the deceased had been waylaid and assaulted by the prisoner, and that, amongst other wounds, he was severely cut across one of his fingers by an iron instrument. On being brought to the infirmary, the surgeon urged him to submit to the amputation of the finger, telling him, unless it were amputated, he considered that his life would be in great hazard. The deceased refused to allow the finger to be amputated. It was thereupon dressed by the surgeon, and the deceased attended at the infirmary from day to day to have his wounds dressed; at the end of a fortnight, however, lock-jaw came on,

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v.
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induced by the wound on the finger; the finger was then amputated, but too late, and the lock-jaw ultimately caused death. The surgeon deposed, that if the finger had been amputated in the first instance, he thought it most probable that the life of the deceased would have been preserved.

For the prisoner, it was contended that the cause of death was not the wound inflicted by the prisoner, but the obstinate refusal of the deceased to submit to proper surgical treatment, by which the fatal result would, according to the evidence, have been prevented.

MAULE J., however, was clearly of opinion that this was no defence, and told the jury that if the prisoner wilfully, and without any justifiable cause, inflicted the wound on the party, which wound was ultimately the cause of death, the prisoner was guilty of murder; that for this purpose it made no difference whether the wound was in its own nature instantly mortal, or whether it became the cause of death by reason of the deceased not having adopted the best mode of treatment; the real question is, whether in the end the wound inflicted by the prisoner was the cause of death?

Guilty.

Brandt for the prosecution.

Wilkins and *Overend* for the prisoner.

1841.

REGINA v. The Inhabitants of the Township of
WAVERTREE.

LIVERPOOL,
April 9.

INDICTMENT for not repairing a highway.

Plea, not guilty.

Evidence of
reputation is
not admissible
to show a li-
ability in the
occupiers of
land to repair
a road, *ratione*
tenuræ.

Crompton, for the defendants, offered evidence of reputation, that the owners of certain land adjoining the road were bound to repair, *ratione tenuræ*, all the road in question, except a certain small part of it.

MAULE J. was of opinion, that evidence of reputation could not be admitted to establish a liability to repair *ratione tenuræ*, that liability being a matter of a private nature.

The evidence was accordingly rejected.

Verdict, not guilty. (a)

Starkie and *Henderson* for the prosecution.

Crompton for the defendants.

(a) In *Rex v. Cotton* (b) where the question was, whether the defendant was liable to repair a highway *ratione tenuræ*, an award, made by an arbitrator to whom the township and a former tenant of the defendant's land had referred the matter, was tendered in evidence against the defendant: and the learned judge, *Dampier J.*, having decided that the document could not be received as an award binding on the defendant, inasmuch as the former tenant had no authority to bind his landlord, the counsel for the prosecution then urged the admissibility of the

(b) 3 Campb. 444.

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Township of
WAVERTREE.

award as evidence of *reputation*: the learned judge rejected the evidence, on the ground that the award was made *post litem motam*, and was therefore inadmissible as evidence of reputation; and it seems to have been taken for granted that, if free from this objection, evidence of reputation would have been admissible. The general doctrine is, that such evidence is to be received in questions respecting public rights, or respecting general customs, which concern parishes, or manors, or the inhabitants of districts, more or less extensive (Phillips on Ev. p. 263. 4th edition), but that it is not receivable in proof of a private prescription (Starkie on Ev. vol. i. p. 61.), or of a particular fact (per Lord *Kenyon* C. J. and *Grose* J. in *Outram v. Morewood* (a)). It may perhaps be considered that the question, whether a particular individual be liable to repair a road, *ratione tenuræ*, is, in some sense, matter of private prescription, although it concerns the inhabitants of the district; and there may consequently be some difficulty in deciding whether it falls within the rule (or rather within the exception) which admits evidence of reputation; for its reception in any case is somewhat of an anomaly, and forms an exception to the general rules of evidence (per Lord *Ellenborough* in *Weeks v. Sparke* (b)). In that case, however, evidence of reputation was adjudged to have been properly received in proof of a prescriptive right of tillage claimed over part of the common of a manor by the plaintiff, as owner of certain messuages, on the ground (as put by *Dampier* J.) that the right claimed was an abridgement of the general right of the commoners; and he adds (p. 691.), "If any individual has a right which tends to abridge the right of the whole neighbourhood, the evidence of reputation is admissible." It would seem that the same rule should apply, where (as in the principal case) the liability attempted to be fixed on an individual "tends to abridge the liability of the whole neighbourhood;" for though the declaration in *Weeks v. Sparke* was against the interest of the party making it, the objection to evidence of this kind does not depend on the interest which the party may have had to misrepresent the fact (*Nicholls v. Parker*, 14 E. R. 331. n.), but on the ground that the declaration which he made was made without the sanction of an oath, or exposure to cross-examination. (Phillips, 260.)

(a) 5 T. R. 123.

(b) 1 M. & S. 686.

REGINA v. THOMPSON.

1841.

LIVERPOOL,
April 9.

THIS was an indictment against the defendant for personating and voting as a burgess of the same name, at an election of a councillor for *Abercrombie* ward, in the borough of *Liverpool*.

The first count of the indictment alleged, that *Liverpool* was a borough named in Schedule A. of the Act for the regulation of Municipal Corporations in *England* and *Wales* (*5 & 6 W. 4. c. 76.*), and was divided into sixteen wards, the boundaries of which were set out and determined by *A. B. & C. D.*, barristers, &c., who had been duly appointed in pursuance of the provisions of the said act: that the copy of the particulars of such division had been transmitted to the Privy Council, and, being approved by them, had been published in the *Gazette*, &c., and that *Abercrombie* ward was one of such wards, &c.: the count then alleged the due holding of the election at which the offence was alleged to have been committed, and the offence itself. There were various other counts, alleging the introductory matter with less particularity, and a count alleging, very generally, that at an election of a councillor for the ward of *Abercrombie*, in the borough of *Liverpool*, pursuant to the statute, &c., the defendant voted, &c., and committed the act laid to his charge.

On the trial of an indictment for personating a burgess at an election of a councillor for a ward of a borough divided into wards under the Municipal Corporations Act, it is enough for the prosecutor to show that the personation took place at what purported to be a ward-election for that ward. It is not necessary to prove the due division of the borough into wards, or that such division was approved of by the Privy Council.

For the prosecution it was proved, that the defendant personated the burgess at what purported to be a ward election for *Abercrombie* ward; but no proof was given of the due creation of the ward.

1841.

REGINA
v.
THOMPSON.

Dr. *Brown*, for the defendant, contended, that it was incumbent on the prosecutor to go further, and prove that the borough had been duly divided into wards, of which *Abercrombie* ward was one; and that the setting forth of the boundaries of the ward by the revising barristers had been duly approved of, &c., in compliance with the provisions of the Municipal Corporations' Act.

MAULE. J. (stopping *Starkie*, *contra*.) Such proof as is asked for by the defendant's counsel would cause intolerable delay and expense.

How far does the objection go? Need you prove that the revising barristers were barristers? and the benchers who called them, benchers? When a man acts as a justice, he is taken to be a justice; and so when the corporation of *Liverpool* act as such, and it is shown that an election, purporting to be the ward election, was held in fact, the provisions of the act must be presumed to have been complied with.

The prosecutor accordingly relied upon the general evidence above referred to — and

MAULE J. told the jury that there was legal evidence to go to them that *Liverpool* was a corporation, and that there was a ward, called *Abercrombie* ward, and left it to them whether it was so or not.

Verdict, guilty.

Starkie and *Crompton* for the prosecution.
Dr. *Brown* for the prisoner.

DORCHESTER.

Coram ERSKINE J.

WINTER *v.* BUTT.

1841.

DORCHESTER,
March 8.

THIS was an action for a breach of promise of marriage.

Pleas, 1st. non-assumpsit, and 2d. misconduct, and want of chastity in the plaintiff.

A witness called for the plaintiff failed to prove the facts expected, and on cross-examination stated very important facts for the defendant, by whom she appeared to have been also subpcœnaed.

The counsel calling a witness who gives adverse testimony cannot on re-examination ask whether the witness had not given a different account to the attorney.

Crowder, for the plaintiff, in re-examination, proposed to ask her as to a statement she had made to the plaintiff's attorney.

This was objected to, and *Wright v. Beckett* (a) was mentioned.

ERSKINE J. I am decidedly of opinion that you cannot ask the question. Mr. Baron *Parke* has, I know, so ruled (b); and I recollect ruling the same way myself on the *Oxford* circuit, with the approbation of Mr. Justice *Patteson*, whom I consulted; and I have since talked with several of the other

(a) 1 Moo. & Rob. 414.

(b) See *Holdsworth v. The Mayor of Dartmouth*, *suprà*, 153.

1841.

 WINTER
 v.
 BUTT.

judges on the point, and find they are generally of opinion that Mr. Baron *Parke*'s decision is right.

Verdict for the plaintiff. (a)

Crowder and *Barstow* for the plaintiff.

Erle and *Butt* for the defendant.

(a) The same question arose on a subsequent occasion during this circuit in a case of *Allay v. Hutchings*, tried at *Taunton*, before Mr. J. *Wightman*, when his Lordship (on Mr. J. *Erskine*'s ruling being cited) expressed himself to be of the same opinion, and refused to allow *Erle* to show that his own witness had given to the attorney of the party, for whom he was called, an account inconsistent with that which he gave on the trial.

EXETER.

Coram *ERSKINE J.*

EXETER,
 March 20.

REDDELL *v.* STOWEY, Sheriff of DEVON-
 SHIRE.

Where a bailiff in possession of goods under a landlord's distress receives a *fi. fa.* from the sheriff, and sells the goods under it, the sheriff is liable in an action, for pound-breach, and rescue, at the suit of the landlord.

CASE for a rescue of goods seized as a distress; and for pound breach; and there was also a count for selling under a *fi. fa.* without paying over to the landlord a year's rent. Pleas, not guilty, and several other pleas immaterial to the point decided.

The facts were, that on the 16th *July* the landlord (*Reddell*) had distrained the goods of one *Porter*, his tenant, employing *Thorne*, a sheriff's officer, as bailiff, in the distress. *Thorne* kept possession under the distress till the 22d *July*, when a warrant of the sheriff to levy under a *fi. fa.* issued

against *Porter* was put into *Thorne's* hands, and he, notwithstanding the representations of the plaintiff to the contrary, acted under the warrant, and sold the goods for the execution creditors, under circumstances (as alleged) of collusion with the execution creditors on his part.

1841.

 REDDILL
 v.
 STOWEY.

Bompas Serjt. contended that at all events this could not be a rescue or pound breach, which must be intended to be the act of adverse persons — a man could not rescue from himself.

ERSKINE J. For the present purposes, *Thorne*, though he happened to be a sheriff's officer, was in possession under the distress, as a mere stranger to the sheriff: the sheriff then comes forward, takes the goods from *Thorne*, and sells them: it is precisely the same as if he had taken the goods from a third person.

Verdict for the plaintiff.

Erle and *Butt* for the plaintiff.

Bompas Serjt. and *Barstow* for the defendant.

1841.

TAUNTON.

Coram ERSKINE J.TAUNTON ,
April 5.REGINA *v.* CHARLES HURSE and
CHARLES DUNN.

If two persons jointly prepare counterfeit coin, and then utter it at different shops, apart from each other, but in concert and intending to share the proceeds, the utterings of each are the joint utterings of both, and they may be convicted jointly.

THE prisoners were indicted on the first count for uttering a counterfeit sixpence to *A. B.*, and on the same day uttering another counterfeit sixpence to *C. D.* Second count for uttering to *E. F.* Third count for uttering to *G. H.*

The facts were that the prisoners were in Wivelscombe together all the day in question, and in the evening quitted a public-house together, having first changed their clothes for the purpose of disguise. Each of them uttered three bad sixpences, made in the same mould, and of the same metal, to shopkeepers in the town, living within a short space of each other; and the prisoners were found together immediately afterwards with counterfeit copper money on their persons, and some of the things bought with the counterfeit sixpences; but there was no proof that they were together at either of the utterings. There were other facts to show a community of purpose.

On these facts being stated by *Moody* for the prosecution, ERSKINE J. called on him to elect as to which of the prisoners and which utterings he intended to proceed.

Moody contended that if the prisoners jointly prepared and provided themselves with the coin for uttering, and shared the proceeds afterwards, they were jointly guilty of each act of uttering; that in misdemeanour, there being no accessaries, the acts which would make them accessaries before the fact in felony made them principals on this charge, and that at all events one of them could be convicted of the two utterings on the same day, and the other for the single uttering, of which he was guilty, on one of the other counts; and he said that this was the usual practice at the *Old Bailey*.

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REGINA
v.
HURSE and
DUNN.

His Lordship then allowed the trial to proceed, *Moody* having elected, in case it should be necessary, to proceed against *Dunn* on the first count and *Hurse* on the second.

ERSKINE J., in summing up, told the jury that if two persons, having jointly prepared counterfeit coin, plan the uttering, and go on a joint expedition and utter in concert and by previous arrangement the different pieces of coin, then the act of one would be the act of both, though they might not be proved to be actually together at each uttering. It might be different, if having possession of the counterfeit coin they share it between them, and each goes his own way and acts independently of the other. If they thought they were acting in concert in the utterings charged, they should convict on the whole indictment. If they thought they were uttering independently of each other they might convict *Dunn* of the two utterings on the first count, and *Hurse* on the other counts.

1841.
REGINA

v.
HURSE and
DUNN.

Verdict, both guilty of the whole, and sentence accordingly. (a)

Moody and Kinglake for the prosecution.

(a) *R. v. Manners*, 7 C. & P: 801.

TAUNTON,
April 6.

REGINA v. J. BARTLETT.

A document in the ordinary form of a bill of exchange, but requiring the drawee to pay to his own order, and purporting to be indorsed by the drawer, and accepted by the drawee, cannot in an indictment for forgery and uttering be treated as a bill of exchange.

THE prisoner was indicted for forging and uttering a bill of exchange, and the acceptance of a bill of exchange.

In several of the counts the bill was set out *verbatim*, and in all it was called a bill of exchange.

The document, when produced, agreed with that set out, and was in the following form : —

“ Nov. 10. 1840.

“ Please to pay to your order the sum of forty-seven pounds for value received.

“ *J. Bishop.*”

“ To Mr. *G. Peckford*,
“ *Yeovil.*”

The paper was indorsed *J. Bishop.*

It was objected for the prisoner, that this could not be called a bill of exchange ; it was nothing more than a request to a man to pay himself, and the acceptance of such a document laid the acceptor under no obligation to a third party,

ERSKINE J. said he should reserve the point for the consideration of the judges, and left the case to the jury, who convicted the prisoner; and he was sentenced to transportation.

His Lordship, however, afterwards thought the objection so clearly valid, that he did not submit the case to the judges, but recommended a pardon for the offence.

Kinglake for the prosecution.

Moody, Williams, and Fitzherbert for the prisoner.

1841.
REGINA
v.
BARTLETT.

GREENWOOD *qui tam* v. WOODHAM.

DEBT to recover a penalty for simony under 13 *Eliz.* c. 6.

The declaration stated the defendant's seisin in fee of the advowson of *Walcot*, an order of the king in council (under 58 *Geo.* 3. c. 45.) to divide the parish into three distinct parishes, to take effect on the next vacancy of *Walcot*,—and a simoniacal and corrupt agreement between the defendant and *J. S.*, with the knowledge and consent of the incumbent, *T. F. W.*, that if the incumbent would vacate the living, and the defendant would thereupon present *J. S.* to one of the newly-formed livings, then *J. S.*

A declaration alleged the division of a parish into several distinct parishes by order of the king in council (under 58 *G. 3. c. 45.*), held, that the allegation could not be proved by production of the Gazette containing a copy of such order.

In debt for penalties under 31 *Eliz. c. 6.* for a simoniacal contract

to present, the declaration alleged a contract by the clerk to buy the advowson, if he were presented to the living, and a presentation in pursuance of such contract, held that proof of presentation was essential to the action, and that for that purpose it was not enough to show that the defendant prepared a presentation and tendered it to the bishop's secretary, but which never was in fact used or acted upon, the clerk having been afterwards instituted on his own petition as equitable owner of the advowson,

CASES
ARGUED AND DECIDED
AT NISI PRIUS

IN THE COURTS OF
Q. B., C. P., AND EXCHEQUER,
AT THE SITTINGS AFTER
EASTER TERM, 4 VICT., AND TRINITY TERM,
5 VICT.

LONDON.
ADJOURNED SITTINGS IN EXCHEQUER.

1841.

WESTMINSTER,
May 28.

HARVEY v. MITCHELL.

ACTION on the case for taking excessive distress.

Where a document is called for after notice to produce by the plaintiff, the defendant may during the plaintiff's case produce evidence to show the document lawfully out of his possession, and such evidence is solely for the judge to determine whether secondary evidence be admissible, and gives the plaintiff's counsel no reply to the jury.

The plaintiff proposed to make use of the distress-warrant as part of his case, and with a view to enable himself to give secondary evidence of its contents, he had given the defendant a notice to produce it, and now gave some evidence to show that it was in the defendant's possession.

Platt thereupon (the plaintiff's case still proceeding) interposed for the defendant, and insisted that he was entitled, in the present stage of the trial, to give evidence to show that the distress-warrant was

gives the plaintiff's counsel no reply to the jury.

not in the possession, or under the controul, of the defendant, but that it had been handed over, pursuant to the statute, to the commissioners of excise.

1841.
HARVEY
v.
MITCHELL.

PARKE B. was of opinion that *Platt* was entitled to do so, and the evidence was accordingly received. His Lordship also expressed a clear opinion that it was for the judge to decide on the sufficiency of the evidence thus adduced, and not for the jury, whose opinion on the matter his Lordship declined to ask ; and, being of opinion that the warrant was by the evidence satisfactorily shown not to be in the defendant's custody, or under his controul, his Lordship refused to permit the plaintiff to give secondary evidence of its contents.

The secondary evidence was accordingly rejected.

The plaintiff's case then proceeded ; and at its close the defendant's counsel addressed the jury, but called no evidence.

Jervis, for the plaintiff, thereupon claimed the right to reply, contending that the defendant had given evidence ; and for the purpose of entitling the plaintiff to reply, it could not be material at what stage of the trial such evidence was given.

PARKE B., however, would not permit the plaintiff's counsel to reply : he said, that the evidence which the defendant had given was merely collateral to the merits of the case, and had been required for the purpose of informing the judge, and not the

1841.
HARVEY

Jury, on a matter which was exclusively within the cognizance of the former.

MURRAY

The plaintiff's counsel accordingly did not reply.
Verdict for plaintiff

Jervis and Humphrey for the plaintiff.
Platt and R. Gurney for the defendant.

ADJOURNED SITTINGS IN QUEEN'S BENCH.

GUTHRIE, MALL,
July 7.

CARRUTHERS v. GRAHAM and Others.

In an action brought by a bankrupt against his assignees, to try the validity of the fiat, the petitioning creditor is not a competent witness to prove the debt due to him, although he has assigned it over to a third person.

TROVER.

Plea, not possessed.

The defendants were the assignees under a fiat in bankruptcy issued against the plaintiff, and the present action was brought by the plaintiff to try the validity of the fiat. Notice had been given of the plaintiff's intention to dispute the act of bankruptcy and petitioning creditor's debt.

For the defendants, the petitioning creditor was called to prove the debt due to him from the plaintiff, and on the *voir dire* deposed that he had assigned it over to a third party.

Platt objected, that the witness was nevertheless incompetent. The action was in fact brought to try the validity of the fiat, and the witness was in-

terested in establishing that it was valid, inasmuch as he had entered into the usual bond, which rendered him liable to pay 100*l.* if he failed to establish the debt on which the petition was founded; and he cited a case (not reported) of *The King v. Clarke*, tried at *Lewes*, some years ago, before the late Lord Chief Justice *Tenterden*. The prisoner was in that case a bankrupt, and was tried for embezzling part of his estate; he disputed the validity of the commission, and the petitioning creditor was called for the prosecution to prove a fact material to support the commission. The Lord Chief Justice, however, ruled that the witness was not a competent one, and rejected his evidence, on the ground that the bond which he had executed gave him an interest to support the commission. So here, the assignment of the debt was an answer to the objection founded on his title to share in the proceeds of the action; but the other objection, his liability on the bond, remained unanswered. He cited also *Green v. Jones*. (a)

1841.

 CARRUTHERS
 v.
 GRAHAM
 and Others.

Kelly, Chambers, and Butt, contra. The validity of the fiat only comes into question incidentally. It does not follow that the fiat would be invalid, or that the witness would be liable on his bond, even if the plaintiff recovered in this action. The bond of the petitioning creditor is conditional (b), "for proving his debt, as well before the commissioners as upon any trial at law, in case the due issuing forth of the commission be contested, and also for proving the party to have committed an

(a) 2 Campb. 411.

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(b) See stat. 6 G. 4. c. 16. s. 13.

C C

1841.
CARRUTHERS
v.
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and Others.

“ act of bankruptcy at the time of taking out such
“ commission, and to proceed on such commis-
“ sion.” The true construction of this condition
is, that the petitioning creditor is liable if he fail
to establish the bankruptcy in any suit brought by
the assignees, and putting the validity of the fiat
specifically in issue: he cannot be bound to sus-
tain the fiat on every occasion when it may come
incidentally into dispute; and they cited *Wright*
v. *Lainson*. (a)

Platt in reply. In *Wright v. Lainson* the as-
signees were not parties; it would therefore have
been unreasonable to contend that the petitioning
creditor's bond could be forfeited by default, on
the part of mere strangers, to establish the fiat;
but here the assignees are parties.

Lord DENMAN C. J. It appears to me that where
the assignees are parties, and the action is really
brought for the purpose of trying the validity of
the fiat, the petitioning creditor has a direct interest
in supporting the side which relies on the fiat. His
interest as a creditor is, indeed, answered by his
having assigned his debt; but the difficulty raised
by his liability on the bond remains without an
answer. The witness must, I think, be rejected. (b)

The witness was accordingly rejected.

Verdict for the defendants.

Platt and *Hoggins* for the plaintiff.

Kelly, *Chambers*, and *Butt* for the defendants.

(a) 2 M. & W. 739. (b) See *Smith v. Groom*, post, p. 388.

1841.

BARKER v. ANGELL and Another.

GUILDHALL
July 8.

CASE for maliciously indicting the plaintiff for perjury.

Plea, not guilty.

The short-hand writer's note of the evidence given at the trial of the indictment for perjury was read for the plaintiff; but upon the witness's proceeding to read the observations made by the presiding judge, after the speech of the counsel for the then defendant, and that a verdict of acquittal was given by the jury without the defendant's calling witnesses,

In case for maliciously indicting the plaintiff, the observations made by the judge on the trial of the indictment are not evidence for the plaintiff.

Sir *F. Pollock* objected, that neither the arguments of counsel, nor the observations of the judge, upon the former trial, were admissible in evidence.

Warren, contra, cited *Warne v. Terry*, tried before *Littledale J.* at *Winchester* in 1836, and reported in *Roscoe on Evidence*, p. 403. (5th edition), where that learned judge had ruled that the observations of the judge on the trial of the indictment, tending to cast censure on the mode in which the prosecution had been conducted, were, in an action of this kind, admissible for the plaintiff.

LORD DENMAN C. J. I should pause long before I could think that the observations of the judge

1841.

BARKER
 v.
ANGELL
 and Another.

on the former trial can possibly be evidence against the defendant upon this : as at present advised, I certainly think they are not admissible.

The witness was consequently desired not to read the speech of counsel nor the observations of the judge.

Verdict for the plaintiff.

Platt and Warren for the plaintiff.

Sir F. Pollock and H. Hill for the defendant.

ADJOURNED SITTINGS IN THE COMMON PLEAS.

WESTMINSTER,
 July 2.

STEINKELLER v. NEWTON.

The depositions of a witness examined on interrogatories are admissible, though it appears that on his examination he referred to papers which he refused to allow the commissioners to see.

ASSUMPSIT for nondelivery of a quantity of speltre according to contract.

Plea, that the plaintiff had circulated false reports against the defendant in the port where the speltre was to have been procured and shipped by him, and had thereby prevented the defendant from fulfilling his contract.

A commission had been issued for the examination of witnesses on interrogatories at Hamburg ; and it appeared, upon the return to the commission, that one of the witnesses during his examination referred, for the purpose of refreshing his memory, to some papers which were before him,

and which, in answer to questions put by the commissioners, he alleged were partly in his own handwriting, and partly not, but which he refused to suffer the commissioners to see, upon the ground that he considered them private memoranda.

1841.

 STEINKELLER
 v.
 NEWTON.

Bompas Serjt., for the plaintiff, contended, that this invalidated the whole examination of the witness, and that none of the answers could be read, by reason that it appeared that the examination was taken illegally. According to the practice of our courts a witness can refer only to papers in his own handwriting, or which were written in his presence at the time of the transaction in question; and whatever document he so refers to he is bound to produce, that the other party may see whether it can be legitimately used for this purpose.

TINDAL C. J. It is a matter of discretion with the judge, whether a witness shall be permitted to refer to particular papers in the course of his examination. I must take it that the commissioners, by proceeding with the examination, exercised their discretion in that respect.

The examination was allowed to be read;
 and in the end the case was arranged.

Bompas Serjt. and *Petersdorff* for the plaintiff.
Martin for the defendant.

1841.

 ADJOURNED SITTINGS IN THE EXCHEQUER.

June 18.

DOWNING v. BUTCHER.

In trespass for false imprisonment on a criminal charge, the defendant cannot cross-examine as to the bad character of the plaintiff, nor as to previous charges made against him.

TRESPASS for false imprisonment, on a charge of obtaining money under false pretences.

Plea, not guilty.

A policeman called for the plaintiff was asked, on cross-examination by the defendant's counsel, whether he had not had the plaintiff in custody before, and also what was her general character.

Both questions were objected to on the ground that they related to matters not put in issue, and it was impossible that the plaintiff could now be prepared to meet such evidence, and *Jones v. Stevens* (a) was cited.

For the defendant it was answered, that with a view to ascertain the amount of injury sustained by the plaintiff, it was clearly most important that the jury should have information on the points proposed to be inquired into; and as they related to matters which, furnishing no bar to the action, could not have been put on the record, the course proposed was the only one by which the defendant had an opportunity of bringing them before the jury.

(a) 11 Price, 235.

GURNEY B. (after communicating with the other judges of this court, who were sitting in *banco* in the adjoining room,) said he was of opinion that neither of the questions could properly be put, and they were accordingly disallowed. (a)

1841.
DOWNING
v.
BUTCHER.

Verdict for the plaintiff.

Thesiger and *Chambers* for the plaintiff.
Jervis and *C. Jones* for the defendant.

(a) In *Rodriguez v. Tadmire**, which was an action for a malicious prosecution, *Lord Kenyon* is reported to have allowed the defendant to give evidence that the plaintiff was a man of bad character; but *Wood* B. refused to permit the defendant to put questions of this kind in a similar case (*Newsam v. Carr*†), saying, that, although such evidence might be given in mitigation of damages in actions of slander, it could afford no proof of probable cause to justify the defendant. In *Cornwall v. Richardson*‡, *Abbott* L. C. J. was of opinion that evidence of character was not receivable on either side in an action where there were counts both for slander and a malicious prosecution.

* 2 Espin. R. 721.

† 2 Stark. R. 69.

‡ Ry. & M. 305.

ROBINSON v. MARKIS.

June 21.

TRESPASS for assault, battery, and false imprisonment. The declaration contained two counts.

Plea, not guilty.

Witnesses had been examined on interrogatories before the Master on the usual terms, in support of the cause of action set forth in the second count. On the deposition of one of the witnesses (a sailor)

In order to let in the deposition of a witness examined on interrogatories, his absence must be shown by some one who can speak to the fact, of his own know-

ledge:—proof of enquiries made at the residence of the witness, and of answers given, is not enough.

1841.
ROBINSON
v.
MARRIS.

being offered in evidence, the attorney's clerk proved that he had made inquiries for the deponent at his residence; and that a person, whom he believed to be the deponent's wife, said that he was abroad, having sailed in the *Thetis*; and the witness added that he had made inquiries, and been told the *Thetis* was now on a voyage. It was objected for the defendant, that this was not sufficient proof of the deponent's being absent, and *Roscoe* on Evidence, p. 79., was referred to.

LORD ABINGER C. B. ruled that the deposition could not be read; that it was indispensable to prove, by proper evidence, to the satisfaction of the judge, that the witness was out of England. Here, there was nothing but hearsay to rely upon. The person who gave the attorney's clerk the information ought to have been produced, or other persons who knew the fact of the deponent's having sailed might have been called.

There was a similar want of evidence as to the absence of the other deponents, and the depositions were accordingly not allowed to be read; and there being no other evidence to support the second count, the defendant obtained a verdict on that, and the plaintiff on the first count.

Damages, 5*l.* (a)

Thesiger and *Martin* for the plaintiff.
Jervis and *Butt* for the defendant.

(a) See *Fulmer v. Hanson*, 1 Campb. 172.

SUMMER ASSIZES, 5 VICT.

1841.

YORK.

Coram Lord DENMAN C. J.

JEWISON v. DYSON.

YORK,
July 19, 20.

ACTION on the case for disturbing the plaintiff in the exercise of the office of coroner, to which he had been appointed by the Queen, in right of her duchy of *Lancaster*, to act exclusively of the county coroners, for the honor of *Pontefract*, in the West Riding of the county of *York*.

In an action to try whether the Queen, in right of the Duchy of Lancaster, has the right to appoint coroners for the duchy, the plaintiff insisting that in former times an officer of the duchy, called the *Feodary*, discharged the duties of coroner: Held, that a manuscript book written by one J. S. (a feodary in the reign of queen Eliz.) and purporting to contain an account of the duties of his office, and precedents relating thereto, was not receivable in evidence for the plaintiff, who claimed to be duchy-coroner,

Pleas. — That the plaintiff had not been appointed coroner for the honor *modo et formâ*.
2. That her Majesty was not entitled to appoint a coroner to act, exclusively of the county coroners, within the honor. There were several other pleas substantially to the same effect.

The action was brought to try whether the duchy of *Lancaster* had the right, by ancient charters, to appoint a coroner for the honor of *Pontefract*; and whether, if the duchy had that right, a coroner so appointed was entitled to hold inquests *super visum corporis* within the honor, exclusively of the county coroners.

The plaintiff put in evidence charters from the crown to the then Duke of *Lancaster*, made in the although such book had been kept in the duchy office, and referred to there as a book of authority.

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reign of *Edward III.*, and containing words which (it was contended) conferred the exclusive right of appointing coroners to act within the lands of the duke(a), though the word "coroner" was not expressly found in the charters; and it was proved that the honor of *Pontefract* was at that time part of the possessions of the duke.

There was evidence of the actual appointment of coroners by the sovereign, as Duke of *Lancaster*, from the time of *Elizabeth*; and evidence of inquisitions held by such coroners for the last eighty or ninety years within the honor, and some few instances of such inquisitions in other parts of the duchy so far back as in 1661-2. But there was no direct evidence that the duchy had ever appointed a coroner, *eo nomine*, before the reign of *Elizabeth*.

To supply that defect, a series of letters patent were put in, under the duchy seal, by which the owner of the duchy for the time being had appointed the patentee to be "his feodary and "bailiff" within the honor; and these patents were produced in a continuous series from 1 *Hen. 5.* till the reign of *Elizabeth*, and (amongst them) one in the last-mentioned reign to *Richard Bedell*.

Some ancient "ministers' accounts," in which were entered the accounts of the feodaries, were produced from the duchy office, to show that the

(a) The words principally relied on by the plaintiff were the following:—"Nec non *attachiamenta tam de placitis coronæ quam de aliis quibuscunque in omnibus terris et feodis suis.*" A rule was obtained by the defendant in *Michaelmas* Term 1841, to shew cause why the verdict should not be set aside, and a new trial had, on the ground that the charters did not confer the right asserted by the plaintiff; but the rule was discharged after argument in *Hilary* Term 1842.

persons so appointed feodaries had discharged the duties of coroners. The plaintiff also tendered in evidence an ancient manuscript book, kept in the duchy office, purporting to be written by *Richard Bedell*, feodary of the honor, and to contain a collection of precedents relating to the office of feodary, and an account of the nature and duties of his office; and the keeper of the duchy records proved, from the appearance of the book, and the character of the writing, that it must have been written about the period when *Richard Bedell* had been so appointed feodary. It was further proved that the book was referred to in the duchy office as one of authority.

It was proposed to read to the jury the terms in which the office of "feodary" was described in this book.

Wortley objected that it was not admissible in evidence. Admitting it to have been composed by *Mr. Bedell* (who had been proved to be feodary in the time of *Elizabeth*), it was still only the unauthentic opinion of that person as to the extent of his powers. It could not be permitted to the duchy, or its officers, to make evidence for themselves by entries of this kind.

Cresswell, contra.— It is an ancient book, composed before there was any dispute as to the meaning of the word "feodary," or the extent of that officer's duties. By the mode in which the book had been preserved and used in the office, it was clear that the duchy had always treated it as one of authority; and the contents of it would clearly

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be binding against the duchy, in favour of any officer subsequently acquiring the office of feodary. It was a declaration by the persons holding the duchy, of the sense in which they used the word. But, to take another ground, the meaning of a term in ancient times could hardly be better ascertained than by the definition given of it by a disinterested writer, acquainted with the subject, in those times.

Lord DENMAN C.J., however, was of opinion that there was not enough to give to the book the character of a public official document, and that its contents could not be made evidence on behalf of the persons who had had the custody of it.

The book was rejected.

Verdict for the plaintiff.

Cresswell, Ellis (Attorney-General for the duchy), *Martin*, and *Robinson* for the plaintiff.

Wortley, Watson, and *Hardy* for the defendant.

CARLISLE,
 August 5.

REGINA v. MARY and JANE HOGG.

In an indictment for the murder of a bastard child, the absence of a name is sufficiently accounted for by the child being described as "then lately before born of the body of J. H."

THE prisoners were indicted for the wilful murder "of a certain illegitimate male child, then lately before born of the body of the said *Jane Hogg*," and the fact, as proved in evidence, was, that the child had been destroyed by the prisoners almost instantly after its birth.

The prisoners having been convicted,

Matthews moved in arrest of judgment, that the person alleged to have been murdered was insufficiently described in the indictment. By the rules of criminal pleading it was necessary either to state in the indictment the *name* of the party on whom the offence is alleged to have been committed, or else to state that the offence is committed *on a person to the jurors unknown*. Here, neither of these forms is followed, and the indictment cannot, therefore, be supported; and he cited *R. v. Biss*. (a)

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LORD DENMAN C. J., over-ruled the objection, expressing a clear opinion that the description was in this case sufficient. The indictment described the party murdered in the only way which, under the circumstances, could have been pursued. It was not the case of a party whose name was unknown, but of one who had never acquired a name, and the indictment identified the party by showing the name of its parent. (b)

His Lordship being of opinion that it was fitting the lives of the prisoners should be spared, directed sentence of death to be recorded; whereupon it was suggested by the counsel for the prosecution that the statute 4 G. 4. c. 48. did not authorise that course to be pursued in cases of murder.

Sentence of death may, since the statute 6 & 7 W. 4. c. 30., be recorded against a person convicted of murder.

His Lordship, however, on referring to the sub-

(a) 2 Moo. C. C. R. 93.

(b) See *Regina v. Hicks*, *anté*, p. 302.

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sequent statute, 6 & 7 W.4. c.30. s.2. (a), thought that the court had now, in cases of murder as well as in other felonies, the power of recording sentence of death, instead of passing it.

Sentence of death was accordingly recorded.

Ramshay for the prosecution.

Matthews for the prisoners.

(a) " And be it further enacted, that from and after the " passing of this act sentence of death may be pronounced after " convictions for murder in the same manner, *and the judge shall* " *have the same power in all respects,* as after convictions for other " capital offences."

WESTERN CIRCUIT.

Coram ROLFE B.

DEVILS,
 July 22.

REGINA v. MIZEN.

An indictment for the non-repair of a highway in the parish of *A.*, alleging the liability by reason of the tenure of certain lands in the said parish, is not supported by proof of a liability to repair a way extending through *A.* and other parishes by reason of the tenure of a farm made up of lands in *A.* and the other parishes.

THIS was an indictment for the non-repair of a highway in the parish of *Wingfield*, to which it was alleged the defendant was liable, by reason of the tenure of certain lands in the said parish.

Upon the evidence it was shown that the defendant occupied a farm called *Midway*, and that the occupiers of that farm had for a long series of years repaired the road in question; but it was proved that *Midway* farm was made up of lands

lands in *A.* and the other parishes.

lying in *Wingfield* and three other parishes, in two of which there was some road also repaired by the occupier of the farm, and in respect of which other indictments were pending.

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It was contended by *Bompas Serjt.*, on behalf of the defendant, that the prescription as alleged was not supported by the evidence, inasmuch as no proof was given of any liability in the defendant, as occupier of the land in *Wingfield* parish, to repair this particular road. The liability, if any, shown by the evidence, was in respect of an entire farm lying in three parishes; but this was not the liability alleged in the indictment.

ROLFE B., in summing up, left it to the jury to say whether the liability, if proved at all, was in respect of the part of the farm which lay in *Wingfield*, to repair the road in *Wingfield*; and his Lordship told them that they must be satisfied that the liability was in respect of that part only, in order to convict under this indictment. If the liability was a liability to repair the road passing through the three parishes by reason of one joint occupation of the whole farm, the defendant must be acquitted.

Not guilty.

Erle and *Bere* for the plaintiff.

Bompas Serjt. and *Cockburn* for the defendant.

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Barton v. Monkton
10. June. C. W. 1841.BRIDGEWATER,
August 12.

REYNOLDS v. MONKTON.

The church-wardens have a discretionary power to appropriate the pews in the church amongst the parishioners, and may remove persons intruding on seats already appropriated.

TRESPASS for an assault and battery.
Plea, not guilty, by statute.

The plaintiff was the occupier of a house and farm in the parish of *Longsutton*, and claimed as such a right to sit in a particular pew in the parish church. On the other hand, the exclusive right to occupy that pew was claimed by one *Gaylard*, another inhabitant, for himself and family.

The defendant was one of the churchwardens of the parish; and on the Sunday on which the assault complained of took place, just before divine service, he was informed by *Gaylard* that the plaintiff was in the pew and refused to leave it. The churchwardens had on previous occasions been appealed to, and had given the plaintiff notice that the pew belonged to the *Gaylard* family. The defendant, on being applied to by *Gaylard*, went in company with the other churchwarden to the pew, and desired the plaintiff to quit it and go to another seat, which he refused to do; whereupon the defendant laid his hand on him with a view to force him out, when the plaintiff rose and walked out. The congregation were assembling, but the clergyman had not entered the church. There was contradictory evidence as to the violence used; and for the defendant it was attempted to establish a prescriptive

right to the pew, as attached to the house in which *Gaylard* lived, his family having for a great number of years sat there; and it was also contended, that at all events the churchwardens had a right to appropriate the seat, which had clearly been done in this case; and *Rogers* on Ecclesiastical Law (p. 171.) was cited.

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ROLFE B. In summing up to the jury, after stating that, in his opinion, the evidence failed to make out the prescription, said, as to the other question, — I think that the churchwardens have a right to exercise a reasonable discretion in directing where the congregation shall sit; and if the defendant used no unnecessary force, he had a right to remove the plaintiff from the pew in question to another seat. If, in the exercise of a fair discretion, the churchwardens thought it more convenient that the pew should be occupied by *Gaylard's* family, and not by the plaintiff, and if the removal could be effected without public scandal, or the disturbance of divine service, the defendant was justified. You are to say whether any unnecessary violence was used.

Verdict for the plaintiff, damages 5*l*.

Crowder and *Bere* for the plaintiff.

Erle and *Moody* for the defendant.

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BRIDGEWATER,
August 16.Doe d. ROWCLIFFE v. EARL OF
EGREMONT.

A witness called on his subpoena *duces tecum*, who objects to the production of documents, has no right to have the question of his liability to produce argued by his counsel retained for that purpose.

THIS was an ejectment brought by the lessee of a tenant for life against the remainder-man under the will of a former Earl of *Egremont*.

The question in the cause was, whether the lease, made by the tenant for life under a power of leasing, was void by reason of not being in compliance with the power.

The lessor of the plaintiff had let judgment go by default in an ejectment brought by the defendant, on the ground of the lease being void; and the present action was brought in order to try that question, and to found an action against the executors of the tenant for life under the covenants of the lease.

Mr. *Murray*, the attorney for the executors, was called on his subpoena *duces tecum*, to produce certain accounts showing how and when the tenant for life had received the rents of the estate in question, and other documents which he held for the executors. He objected to produce those documents, on the ground that it would be prejudicial to the interests of the executors, they being in the nature of title deeds.

Greenwood appeared as counsel for the witness to contend that he was not bound to produce the

documents. He was proceeding to argue the question, when an objection was made to his right so to appear by the counsel for the plaintiff.

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ROLFE B. said, The course has always been for the witness himself to state to the judge the grounds upon which he contends he is not bound to produce the document required, and the judge is to decide on the validity of those grounds, and to give to the witness the protection claimed, if he finds him to be entitled to it. (a)

Greenwood was not allowed to be heard ; and in the result the witness was required to produce the documents, which he accordingly did.

Verdict for the defendant.

Bere and *Kinglake* for the plaintiff.

Erle, *Crowder*, and *M. Smith* for the defendant.

(a) So, it has been held that an objection to questions proposed, on the ground of their tendency to criminate the witness, must come from the witness himself (*Thomas v. Newton*, M. & M. 48.); and the counsel who calls the witness will not be allowed to argue in support of the objection. (*R. v. Adey*, 1 Moo. & Rob. 94.)

CASES
ARGUED AND DECIDED
AT NISI PRIUS
IN THE COURTS OF
QUEEN'S BENCH, COMMON PLEAS, AND
EXCHEQUER,
AT THE SITTINGS AFTER
MICHAELMAS TERM,
5 VICT. 1841.

ADJOURNED SITTINGS IN THE QUEEN'S BENCH.

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WESTMINSTER,
Dec. 3.

SMITH v. GROOM and Two Others.

In an action
against the
assignees of a
bankrupt for
seizing goods
alleged to have
been assigned

to the plaintiff by the bankrupt before his bankruptcy, the bankrupt is a competent witness for the plaintiff, to prove that the assignment was made for a valuable consideration, and in consequence of pressure, although the defendants rely on the assignment as constituting in itself an act of bankruptcy.

In such action, where no notice has been given of disputing the trading, act of bankruptcy, or petitioning creditor's debt, the petitioning creditor (having assigned his debt, and executed a release to the assignees) is a competent witness for them to prove an act of bankruptcy prior to that on which the adjudication took place, for the purpose of over-reaching the alleged assignment to the plaintiff.

TRESPASS for breaking and entering a dwelling-house, and continuing and making a disturbance therein, and taking down fixtures, and carrying away furniture, &c.

Pleas, 1st, Not guilty.

2dly, That the dwelling-house, fixtures, and furniture, &c. were not, nor were, nor was any of them, or any part thereof, at the said times when, &c., the property of the plaintiff, *modo et formā*, and issue thereon.

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The plaintiff was the sister-in-law of one *George Wyatt*, against whom, and one *Henry Thompson*, a joint fiat in bankruptcy issued, bearing date 8th of December, 1831, founded on an act of bankruptcy committed on the 1st of December. The defendant *Groom* was the official assignee under that fiat; one of the other defendants (*Cater*) was the surviving creditors'-assignee, and *Brenchley* (the remaining defendant) was an auctioneer employed by them. The bankrupt *Wyatt*, very shortly before the bankruptcy, viz. on the 8th of November, 1831, executed to Mrs. *Smith*, the plaintiff's mother, an assignment of the lease of the dwelling-house in question, and of the fixtures and furniture therein. Mrs. *Smith* shortly afterwards died, having by will bequeathed the property to the plaintiff; the assignees, however, seized the fixtures and furniture, and in December, 1832, sold them (through the defendant *Brenchley*) for the benefit of the creditors under the fiat; and they now defended the action on the grounds,—1st, That the assignment by *Wyatt* to Mrs. *Smith* was made by way of fraudulent preference to her, and in contemplation of bankruptcy. 2dly, That the transaction amounted to a fraudulent transfer or delivery of goods, with intent to defeat or delay creditors,

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and was therefore in itself an act of bankruptcy within the third section of the act 6 G. 4. c. 16. 3dly, That *Wyatt* had committed an act of bankruptcy prior to the assignment to Mrs. *Smith*, and less than two months before the assignment, which would consequently invalidate the assignment under the eighty-first section of the act. 4thly, That the goods were in the possession, order, and disposition of the bankrupt, at the time of his bankruptcy, with the consent of the true owner thereof. No notice had been given of the plaintiff's intention to dispute the bankruptcy.

For the plaintiff, *Wyatt*, the bankrupt, was called to prove the debt due from him to Mrs. *Smith*, the mother of the plaintiff, and pressure by her for security, and that in consequence thereof he executed the deed of assignment.

Kelly, for the defendants, objected that he was not a competent witness. He said it was a general rule that a bankrupt could not be received to disprove the act of bankruptcy: it is true the fraudulent assignment to Mrs. *Smith* was not the act of bankruptcy upon which he was adjudged a bankrupt; but the defendants, nevertheless, relied upon that transaction as constituting in itself an act of bankruptcy.

It was answered, that the witness was called neither to prove nor to disprove an act of bankruptcy, but in reality to diminish the funds of his estate, by showing that part of the goods seized by his assignees belonged to a third person, for which

purpose a bankrupt has always been considered a competent witness. (a)

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v.

Lord DENMAN C. J. overruled the objection, and the witness was examined. GROOM and Two Others.

For the defendants, the fiat was put in, together with the provisional assignment and the certificate of the appointment of assignees; and the petitioning creditor under the fiat was then called, to prove the embarrassment of the bankrupt at and prior to the time of the execution of the assignment to Mrs. Smith, and also that the bankrupt had committed acts of bankruptcy before the date of that assignment, and whilst the debt was due to the petitioning creditor.

Platt objected that he was not a competent witness, on the ground, first, of his general interest as a creditor; secondly, of the bond he had entered into to the Lord Chancellor; and he cited *Green v. Jones* (b), and *Bisse v. Randall*. (c)

The first objection was obviated by the witness's deposing that he had assigned his debt to a third person, and executed a general release to the assignees; and, as to the other objection,

Kelly contended, that as no notice had been given to prove the bankruptcy, that was no longer

(a) See *Butler v. Cooke*, Cowp. 70.

(b) 2 Campb. 411.

(c) 2 Campb. 493.

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a matter in dispute; the petitioning creditor was not, therefore, in any peril by reason of the bond, and the principle on which he was objected to ceased to apply; and he cited *Lloyd v. Stratten*. (a)

Lord DENMAN C. J. was of opinion that the witness was competent to be examined for the purposes stated, and he was accordingly examined. (b)
 Verdict for the defendants.

Platt and Archbold for the plaintiff.
Kelly, R. V. Richards, and Whateley for the defendants.

(a) 1 Stark. R. 40.

(b) See *Carruthers v. Graham*, *ante*, p. 368.

GUILDHALL,
 Dec. 11.

MORRIS and Others v. HAUSER and M'KNIGHT.


A notice to produce all letters written by the one party to, and received by, the other, between the years 1837 and 1841 both inclusive, held sufficient to call for a particular letter.

ASSUMPSIT for goods sold and delivered, and for money lent, and on an account stated.

The defendant *M'Knight* had let judgment go by default. The defendant *Hauser* pleaded several pleas.

For the defence, a particular letter was called for, in pursuance of a notice to produce. For the plaintiff, it was objected that the notice to produce

was too general: it was addressed to the plaintiff, and required him to produce, amongst other things, "also all letters written to and received by you " between the years 1837 and 1841, both inclusive, " by and from the said defendants, or either of " them, or any person in their behalf; and also all " books, papers, &c. relating to the subject-matter " of this cause."

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LORD DENMAN C. J. was of opinion that the notice was sufficient; and on the letter not being produced, secondary evidence was attempted; but the defendant failed in making out his case, and the plaintiffs obtained a verdict.

Erle and Martin for the plaintiffs.

Petersdorff and Lush for the defendants.

See *France v. Lucy*, Ry. & M. 341. *Jones v. Edwards*,
 M'Clel. & Y. 139. *Jacob v. Lee*, *suprà*, 33.

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ADJOURNED SITTINGS IN THE COMMON PLEAS.

GUILDHALL,
Dec. 20.LEAKE *v.* The Marquis of WESTMEATH.

A decree of the Court of Arches for alimony is not admissible in evidence without proof of the proceedings in the suit.

Where a suit is removed by appeal from the Consistory Court to the Court of Arches, the judgment of the Court of Arches is not admissible in evidence without shewing that court to be duly in possession of such suit by producing the process of appeal, viz. the transcript of the proceedings sent from the court below.

ASSUMPSIT on an attorney's bill.Pleas, 1. *Non-assumpsit*. 2. Statute of Limitations.

It was stated by the plaintiff's counsel, in opening his case, that the defendant and Lady *Westmeath*, his wife, living separate, the defendant, in 1821, instituted a suit against her in the Consistory Court of *London* for restitution of conjugal rights, which was met by Lady *Westmeath*'s putting in a plea for a divorce, on the ground of cruelty and ill-treatment. In *Easter Term*, 1821, Sir *C. Robinson*, the judge of that court, decided that Lady *Westmeath* had not substantiated the allegations in her plea, and made a decree that the defendant was entitled to the restitution of conjugal rights, and that Lady *Westmeath* should be admonished to return to, and cohabit with, him. Against this judgment Lady *Westmeath* appealed to the Arches Court of *Canterbury*; and in *Easter Term*, 1827, the judge of that court (Sir *John Nichol*) pronounced judgment in favour of the appellant, divorcing her *à mensâ et toro*, and condemning Lord *Westmeath* in all the costs, as well of the original suit as of the appeal. The defendant thereupon appealed to the High Court of Delegates, by which court the judgment of the Arches Court was, in April, 1829,

affirmed. The defendant then presented a petition to the king in council, praying for a commission of review, which, however, after argument, was refused. The plaintiff had been employed by Lady *Westmeath* as her solicitor, since 1827, in carrying on these various proceedings, and also in defending an appeal from the *Irish* Court of Chancery to the House of Lords, in a suit instituted by the Marquis of *Westmeath* against the marchioness and her trustees, for the purpose of setting aside a deed of separation, executed by the marquis in 1818; and the present action was brought to recover the costs incurred in all these proceedings between 1827 and *December* 1832.

No application had been made by Lady *Westmeath* to the ecclesiastical courts for alimony *pendente lite*; but upon the termination of the proceedings, when the commission of review was refused, she commenced proceedings in the Court of Arches for permanent alimony, by filing in *November*, 1832, what is called "an allegation of "faculties," in that court. This allegation was supported by an affidavit of Lady *Westmeath*, sworn in May, 1833; and the defendant having put in his answer to the allegation, the judge (Sir *J. Nichol*) on the 9th *July* in that year gave judgment, decreeing permanent alimony at a certain sum per annum; which judgment, on appeal to the privy council, was affirmed, the Court of Appeal merely reducing the amount of alimony awarded.

The *Attorney-General* for the purpose (as he alleged) of showing, that Lady *Westmeath* was living apart from her husband under justifiable cir-

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cumstances, proposed to put in the judgment of the Arches Court, decreeing alimony; and an officer of that court was called, who produced a book containing short minutes of the proceedings in court; viz. first, an entry of the receipt of the documents from the court below; secondly, appointments of the days for hearing; thirdly, entries of the different steps taken in the suit; and, fourthly, the judgment of Sir *John Nichol*, which was given at full length, and of which it appeared that there was not any formal entry except that contained in the book produced. On cross-examination he stated that the *process* of appeal consisted of a transcript of the proceedings sent up from the court below, and which, on the determination of the appeal, was remitted to the court below. That transcript had not been brought by the officer of the Consistory Court with the other documents which he had now in court, in obedience to the subpoena served upon him.

The Attorney-General now proposing to read the judgment of Sir *J. Nichol* from the book of minutes,

The Solicitor-General objected to the admissibility of the evidence. At present it does not appear that there was any jurisdiction in the Court of Arches to entertain the suit; or, indeed, what the nature of the suit was, except by the short and incomplete statements of the different proceedings in the Court of Appeal. To let in evidence of the judgment of the Court of Appeal, first, the transcript of proceedings from the Consistory Court,

which was the process of appeal, ought to have been produced; secondly, the several proceedings in the suit, which led to that judgment, ought also to be produced; for an inference is, no doubt, intended to be drawn from the amount of provision decreed to Lady *Westmeath* as alimony, and if so, the defendant is entitled to have before the Court the proceedings on which that decree was founded.

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The Attorney-General. The judgment of the Arches Court is tendered, not for the purpose of enforcing it, but merely for collateral purposes; and for such purposes, at all events, we have done enough to make it evidence. There is no formal entry of the judgment except that which the officer now holds in his hand; and credit must be given to the judge of that court, that he did not give judgment in a suit which was not duly before him. It never could be necessary that, for the mere purpose of proving separation, all the proceedings in the suit should be given in evidence.

TINDAL C. J. A decree of the Court of Chancery cannot be read in evidence against a party, without also putting in the bill and answer; and, on the same principle, the judgment of the Ecclesiastical Court cannot be made evidence, without evidence of the proceedings in the suit. I do not say the plaintiff is bound to produce the affidavits which may have been filed, but I think he is bound to show what the pleadings were, by producing the libel and answer and the defensive allegations. It appears to me also, that the transcript

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from the Court below ought to have been produced, to show that the Arches Court was duly in possession of the suit.

The judgment of the Arches Court was accordingly rejected.

The Attorney-General, to obviate the objection, now called the keeper of the records of the Consistory Court, who produced the citation, libel, appearance, and allegations filed, and judgment pronounced, in that court, concluding with an entry, at the foot of the judgment, that Lady Westmeath appealed from the judgment, which (the officer said) was the only entry on record ever made of an appeal from the judgment of that court. *The Attorney-General* contended that he had now done enough to let in the judgment of the Arches Court, having shown a suit duly instituted and terminated in the court below, and an appeal from that court; and he added, that in the event of the evidence being now rejected, he should feel it to be his duty to tender a bill of exceptions to the ruling of the Lord Chief Justice.

The Solicitor-General renewed his objection on both the grounds before urged; and the Lord Chief Justice ruled that the judgment for alimony was still inadmissible.

An officer from the Consistory Court afterwards brought the transcript; but the objection was renewed, that though this met the difficulty as to the want of jurisdiction in the Arches Court, still the

judgment of that Court decreeing alimony in 1833 could not be received without producing the proceedings in the suit which led to that judgment.

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TINDAL C. J. I am still of opinion that the judgment cannot be put in evidence, until you show the proceedings on which it rested.

The evidence was accordingly again rejected.

The commission under the great seal authorising the High Court of Delegates to hear the appeal from the judgment of divorce pronounced by the Arches Court in 1827, and the judgment of the Court of Delegates on that appeal, were read without opposition ; and in the result, a verdict was taken for the plaintiff, subject to a special case.

Sir *F. Pollock* Attorney-General, *Ludlow* Serjt., and *Hoggins* for the plaintiff.

Sir *W. Follett* Solicitor-General, Sir *T. Wilde*, and *Shee* Serjt. for the defendant.

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 ADJOURNED SITTINGS IN THE EXCHEQUER.

 WESTMINSTER,
 Dec. 3.

ADAMS v. GARRARD.

The deposition of a witness examined on interrogatories, jointly interested with the defendant, may be read in evidence for the defendant, the name of the deponent being indorsed on the record, under stat. 3 & 4 W. 4. c. 42. s. 27.

ASSUMPSIT for wharfage, work, and labour, &c.
 Plea, *non-assumpsit*.

The action was brought against the defendant as managing director of a company formed for working some marble quarries in Ireland.

A witness was examined for the defendant, who, in answer to a question put by the plaintiff's counsel on cross-examination, said he had heard from the defendant himself that a person of the name of *Hardy* was jointly interested with him in the quarries, and in the subject-matters of this action. At a later period of the cause, the defendant tendered in evidence the deposition of *Hardy* taken in Ireland, by virtue of a commission issued in this cause. Whereupon *Byles*, for the plaintiff, objected to the reception of the deposition. *Hardy* was a partner in the transaction, and as much interested in getting rid of the plaintiff's demand as the defendant himself.

Lord ABINGER C. B., however, ruled that the deposition was admissible in evidence; for the name of the defendant might be indorsed on the record

in the same way as if he had been examined *viva voce*. (a)

1841.
ADAMS
v.
GARRARD.

The deposition was accordingly read for the defendant.

Verdict for the plaintiff.

Byles for the plaintiff.

Hoggins and *Milman* for the defendant.

(a) Where a witness produced in court is objected to as interested, and a release is proposed, the objecting counsel has a right to insist on the execution of the release before the examination of the witness; and so if, in lieu of a release, the name be indorsed on the record, that is always done in the first instance. If this be on the principle that the bias of interest ought to be removed before the witness gives his testimony, it would seem that the objection could not be removed by the subsequent indorsement of the name of the deponent. The legislature has apparently omitted to provide for this difficulty in the case of witnesses examined on interrogatories, who certainly seem to be rendered competent by the 26th section of the stat. 3 & 4 W. 4. c. 42.

SERLE v. NORTON.

GUILDHALL,

Dec. 9.

Assumpsit by the holder of a banker's cheque for 20*l.*, drawn by defendant on *Hulle* and Co., bankers at *Uxbridge*, dated 19th *March*, 1841; there were also the usual money counts.

Ranchurn Birtwick
The holder of a banker's cheque ought to present it for payment within a reasonable time; and it is a question for the jury on an issue of due presentment, whether

Pleas: 1. That the defendant did not make the cheque.

2. That the cheque was not duly presented.

Where a cheque drawn on a country banker, dated 19th *March*, was not presented until 6th *April*, and no cause was assigned for the delay, but the drawer had not sustained loss by the non-presentment at an earlier period, the drawer was held liable to be sued on the cheque.

1841.



SERLE

v

NORTON.

3. Payment.

4. (As to the money counts) *non-assumpsit*.

The cheque was drawn payable to one *White*, and there was evidence that it was drawn and issued by the defendant to *White*, at *Windsor*, some days before that on which it bore date; and *White*, on the same day that he obtained possession of the cheque, paid it away to the plaintiff. The cheque was not presented until the 6th of *April*, on which day the plaintiff caused it to be presented to *Hulle* and Co., at *Uxbridge*, through Messrs. *Glyn*, bankers in *London*, who were correspondents of *Hulle* and Co. No cause was assigned for the cheque's not having been presented earlier.

Ball for the defendant, besides contending that there was evidence of the cheque's being post-dated, and therefore void, insisted, further, that it had not been presented within a reasonable time, and that the defendant was, therefore, entitled to a verdict on the second plea.

S. Temple, contra. There is no fixed rule as to the time within which bankers' cheques must be presented. Here, there is no evidence of the bankers having failed, or that the defendant has sustained any loss by the plaintiff's delay in presenting the cheque. The cheque is drawn on a country banker; and some latitude must be allowed in such a case, beyond what would be reasonable time for presenting a cheque on a *London* banker. Even if the jury found the cheque to have been post-dated, the plaintiff was still entitled to a verdict on the money counts.

Lord ABINGER C. B. If the jury think that the cheque was post-dated it is void, and the defendant will be entitled to a verdict on the first plea. The only doubt is, whether such a defence be open to the defendant on the first plea. In regard to the money counts, I think there is no such privity between the parties as will entitle the plaintiff to a verdict on those counts. If, however, the plaintiff think he can make any thing of these points, I will give him leave to move. As to the other defence, the question is one for the jury, whether, under the circumstances of the case, the cheque was presented within a reasonable time; for that is all which, in the case of bankers' cheques, the law requires. It is reasonable to allow some little space of time in the case of cheques on country bankers, beyond what is usual in the case of *London* bankers. If, indeed, any loss had been sustained by the defendant through the non-presentment at an earlier period, that might have made a difference. The jury must form their own conclusion; but I do not myself see any sufficient ground for saying, that the lapse of time in this case necessarily involves any laches.

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SERLE
v.
NORTON.

Verdict for the defendant on the first and last pleas; for the plaintiff on the second and third.

S. Temple for the plaintiff.

Ball for the defendant.

Temple in the ensuing term moved for a rule to show cause why the verdict should not be entered for the plaintiff on the money counts: but the

1841.

SERLE

v.

NORTON.

Court being of opinion that the plaintiff had no evidence applicable even to those counts, without producing the post-dated cheque, the rule was refused. (a)

(a) Bankers' cheques are instruments *sui generis*, in many respects resembling bills of exchange, but in some entirely different. "They are not accepted nor indorsed, nor protest-able, nor entitled to any day of grace" (3 Burr. 1517.); and it was once thought that they were not negotiable generally, but only within the bills of mortality (*ib.*); and even now, though in fact negotiable, and often negotiated, they are not considered as intended for negotiation, and a person takes them from the holder subject to perils not incident to negotiable instruments generally. (*Down v. Halling*, 4 B. & C. 333.) It is difficult, however, to see how a solvent drawer, on a solvent banker, can be prejudiced by delay in the presentment of a cheque. By drawing such a cheque he appropriates a sum of money, then in his banker's hands, to the payment thereof, and cannot honestly reduce his account below that amount (*Boehm v. Stirling*, 7 T.R. 429.), and as between him and the payee of the cheque, the question of reasonable time for presentment can scarcely arise unless some damage has arisen in consequence of the non-presentment. But the refusal to pay by bankers may arise from other causes than their own insolvency. The drawer of the cheque may have become insolvent, or have withdrawn his account; in which cases it is difficult to see how he is injured by the delay. Another reason for the bankers refusing to pay may be the staleness of the cheque, it being understood as a rule of business with regular bankers not to pay old cheques without enquiry. If, upon the bankers refusing on that ground to pay the cheque, the holder were to commence an action against the drawer, without giving him an opportunity of authorizing his bankers still to pay the cheque, the plaintiff would probably fail, on the averment of due presentment of the cheque, as was contended in the principal case, and the non-presentment in due time might, under such circumstances, support the plea of payment of the original debt by the cheque. Although the holder of a cheque, who does not present it within a reasonable time, is guilty of laches, the consequences of such laches may vary according to the circumstances of each case.

CASES
ARGUED AND DECIDED
AT NISI PRIUS

IN THE COURTS OF
QUEEN'S BENCH, COMMON PLEAS, AND
EXCHEQUER,
AND ON THE
NORTHERN AND WESTERN CIRCUITS.

SITTINGS AFTER HILARY TERM, 5 VICTORIA.
COMMON PLEAS.

SHIRES *v.* BURROW.

1842.
WESTMINSTER,
Feb. 2.

Assumpsit. First count, Payee *v.* maker of a promissory note.

Second count, on an account stated.

Plea. As to the first count, that the defendant made the promissory note when he was intoxicated and incapable of knowing what he was about. To the second count, *non-assumpsit*.

The defendant did not appear to support the issue on the first count.

Addison, nevertheless, proposed calling the attesting witness to prove the making of the note,

1842.
SHIRES
v.
BURROW.

contending that he should thereby entitle himself to a verdict on the second count also.

TINDAL C. J. expressed an opinion that the plaintiff could not recover on both counts.

Addison cited *Mee v. Tomlinson* (a) as an authority to shew that the causes of action in the two counts were distinct, although supported by the same evidence; and that for the purpose of relieving the plaintiff from any deduction of costs on the second count, he was entitled to enter the verdict generally, though he could not recover damages beyond the amount of the note.

TINDAL C. J. I am of opinion you cannot do so. You can elect on which count you will take the verdict if both counts are applicable to the cause of action; but when there is clearly only one cause of action, I cannot allow you to recover as for two distinct causes of action.

Addison thereupon took a verdict on the first count, and a verdict was entered for the defendant on the last. (b)

(a) 4 A. & E. 262.

(b) See accordingly *Ward v. Bell*, 1 C. & M. 848.; *Deere v. Ivey*, 12 Law Jour. 132.; *Holford v. Dunnett*, 7 M. & W. 348.

MOORE v. WOOD.

1842.

WESTMINSTER,
Feb. 15.

DEBT for goods sold and delivered, and the money counts.

Pleas, except as to 10*l.* paid into court, *nunquam indebitatus*. 2*d.* (Except as aforesaid), a set-off for goods sold, &c., in the usual form. 3*d.* To 10*l.* payment into court.

Replication joining issue on the first plea; and to the plea of set-off, the Statute of Limitations.

The plaintiff established a demand of 61*l.* The defendant offered evidence of a set-off of 59*l.* for wine, the defendant being a wine merchant; and the plaintiff's counsel cross-examined, in order to reduce the set-off, 1*st.*, by showing that the defendant's bill was over-charged; 2*d.*, that within six years the plaintiff had (as he alleged) paid part of the defendant's bill, by some bottles said to have been sent and taken as payment; the defendant, however, contending they were return bottles of the original delivery of wine sent in upon terms of the empty bottles being taken back.

It was objected, that under the pleadings the amount of the set-off could not be disputed, inasmuch as the replication only denied the demand having accrued within six years.

The plaintiff, on a replication of the Statute of Limitations to a plea of set-off, cannot on the trial reduce the amount of the set-off by showing payment of part; the payment of part ought to have been replied.

1842.

MOORE

v.

WOOD.

Bompas, Serjeant. If that be true, it is only necessary for the defendant to show any sum, however small, due within the six years, and he is thereby enabled to set up against the plaintiff a demand of any amount, however stale it may be ; for the plaintiff cannot reply double.

TINDAL J., after looking at the set-off, intimated a strong opinion that the plaintiff, by the pleadings, admitted a debt exceeding the plaintiff's demand, and could only contest the time of its accruing. The essence of the plea in form and substance is that it does so exceed ; and as to the argument of a small item within the statute drawing a large demand of ancient date also within it, that might be obviated by the plaintiff's replying, except as to so much, payment, and as to that sum, the Statute of Limitations.

It was, however, agreed, that the case should proceed, subject to the point being reserved for the court above, if it should become necessary. The two questions were left to the jury, whether the return of the bottles was intended as a payment on a new agreement, or whether they were mere return bottles as alleged by the defendant : and 2d, Whether the amount of the defendant's bill for wine was overcharged : and the jury found a verdict for the defendant on both questions.

Bompas Serjt. and *Petersdorff* for the plaintiff.
Talfourd Serjt. and *Byles* for the defendant.

The MAYOR, COMMONALTY, and CITIZENS of the City of London *v.* The MASTER, WARDENS, and COMMONALTY of the Art or Mystery of Pewterers of the City of London.

1842.
GUILDHALL,
Feb. 29.

Pladings &c. v. Pladings &c.
17 L. J. 246.

THIS was an action on the case brought by the plaintiffs, as reversioners of a house in *Leadenhall* Market, for the obstruction of certain windows. The declaration alleged, that before and at the time of the committing of the grievances, a certain messuage, &c. had been demised to one *E. Chipper*, as tenant to the plaintiffs, the reversion thereof belonging to the plaintiffs; in which messuage there were, and still of right ought to be, divers to wit, twenty-four windows, through which the light and air during all the time aforesaid ought to have entered, and still, &c. for the convenient and wholesome use and enjoyment thereof. Yet, &c.

An actual enjoyment of lights for 20 years, even under a permission verbally asked for by the occupier of a house, and given by the person having right to obstruct, is sufficient to confer a right under 2 & 3 W. 4. c. 71. s. 3. The enjoyment under that section need not be as of right, or adverse.

The defendants pleaded (traversing the allegation in the declaration), that "there were not, nor of right ought there to have been, any such windows through which the light and air ought to have entered, or did enter, into the said messuage, in manner and form, &c."


The house in question was built in 1815, on the site of an old house which was then pulled down.

1842.
 The MAYOR,
 &c. of Lon-
 don
 v.
 The MAS-
 TER, WAR-
 DENS, &c. of
 the Pewter-
 ers' Com-
 pany.

In the new house, the windows in dispute were put in the back part, looking towards the *Pewterers'* Hall, there being only a yard or court between the premises; and the plaintiffs' case was that they had been enjoyed in fact, and without interruption, up to the time of the obstruction in 1840. The obstruction was then put purposely to try the right; and Sir *T. Wilde* for the plaintiffs rested his case on the right acquired or confirmed by such user, under the 2 & 3 *Will.* 4. c. 71. s. 3. It appeared that the new house had been extended a few feet further towards the *Pewterers'* Hall than the former house, that is to say, as far as a wall, belonging to the defendants, that stood between the old house and the premises of the defendants. There were some windows in the old house partly obstructed by the wall.

For the defendants, *Channell*, Serjt., proposed to prove, that when the new house was built in 1815, the *Pewterers'* Company had made objections to the windows in question as well as to others put out by other parties. The tenant of the plaintiffs' house, and the other parties, were then summoned to attend a court of the Company; and, in 1818, in consequence of a letter sent by the clerk of the Company, the then tenant of the plaintiffs' house, Mr. *Chipper*, attended, and asked to be allowed to continue the windows on sufferance, and it was agreed verbally that he should pay a rent of 2*l.* a year; and the clerk was directed to prepare an

agreement to that effect. He did so, and sent the draft to Mr. *Chipper*, who kept it for some time; but, in 1820, returned it, refusing to abide by the agreement; — the agreement could not now be found. In 1819 the defendants had leased the premises opposite the back of plaintiffs' house. *Channell*, Serjt., contended, that these facts would defeat the operation of the statute; that the enjoyment intended in sect. 3. must be an enjoyment as of right, and adverse to the persons interested in any opposition to it. Here it was, in fact, an enjoyment by mere sufferance; and, as to the enjoyment from 1820, the defendants could not be prejudiced by the acquiescence of their tenant.

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 the Pewterers' Com-
 pany.

Wilde Serjt. The enjoyment need not be as of right. It is sufficient that the actual user should be for twenty years. Mr. Baron *Parke* decided that point, and the case afterwards went to the Court of Error, and Lord Chief Justice *Tindal* delivered the judgment of the court; *Flight v. Thomas*. (a) In that case *Maule J.*, p. 695., says: — “Section 2. requires that the easements therein mentioned shall “have been enjoyed by persons ‘claiming right “thereto,’ but in sect. 3., which relates to the access “of light, there is no such expression, and I think “the omission is made purposely.”

(a) 11 Ad. & E. 688.

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 The MAYOR,
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 v.

The MAS-
 TER, WAR-
 DENS, &c. of
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 pany.

TINDAL C. J. expressed an opinion that the facts opened by the defendant's counsel would not amount to a defence in law.

Channell Serjt., called a witness to show that the wall spoken of, whilst it stood, obstructed the windows of the old house so as to prevent their overlooking the premises of the *Pewterers'* Company. At the close of his examination,

TINDAL C. J. said, I think that all you have stated will not amount to a defence. The statute says, where the access of light "shall have been actually enjoyed for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible any local usage to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement in writing." That is the enactment, even if at the outset the windows were improperly constructed. Here is nothing but a negotiation; and putting out of question all that relates to the old house, and taking this from 1815 only, as a new house then first built, and that then a negotiation is entered into for an agreement which you are unable to produce, I think that this, if proved, will not meet the expressions used in the Act of Parliament, that the enjoyment of the right must be by consent or agreement in writing.

Whereupon *Channell* Serjt. consented to a verdict for the plaintiffs.

Sir *T. Wilde*, the *Common Serjeant*, and *H. Hill*
for the plaintiffs.

Channell Serjt. for the defendants.

SPRING ASSIZES, 5 VICTORIA,

LIVERPOOL.

Coram ROLFE B.

1842.

The MAYOR,
&c. of London

v.

The MAS-
TER, WAR-
DENS, &c. of
the Pewter-
ers' Com-
pany.

BROWN v. BRADFORD.

LIVERPOOL,
April 1.

ASSUMPSIT for money had and received.

1st Plea, *Non-assumpsit*; 2d, Set-off, issue thereon; 3d, Payment, &c., issue thereon; 4th, That the defendant was an insurance broker; that the money was part of the produce of a certain policy of insurance effected by him, as agent for and on the orders of Messrs. *Ferris, Butler*, and Co. of *Liverpool*, on the ship *Mary Ann*; that the defendant was ignorant that the plaintiff had any interest in the ship or in the insurance, and that he effected the policy in the belief that *Ferris, Butler*, and Co. were alone interested in it; that the ship being lost, the defendant as such broker received from the underwriters the amount insured; that Messrs. *Ferris, Butler*, and Co. were indebted to the defendant, and that the defendant thereupon claimed to retain the money sought to be recovered in satisfaction of the balance due to him from *Ferris, Butler*, and Co.

A. is registered owner of certain shares of a ship, the remaining shares belonging to *C.* and *D.*, his partners in trade, according to their interests in the general property of the partnership. Held, that *A.* alone could not maintain an action for money had and received against the defendant, an insurance broker, to recover his proportion of the proceeds of a policy of insurance effected by the defendant on the ship.

1842.
BROWN
v.
BRADFORD.

Replication, That the defendant did not effect the insurance as agent for *Ferris, Butler, and Co.*, nor in ignorance that the plaintiff had an interest. Issue thereon.

It appeared that *Ferris, Butler, and Co.* carried on business at *Liverpool* as general merchants; and they had also a house, consisting of the same identical partners, at *St. John's, Newfoundland*, where they carried on business under the firm of *Butler, Ferris, and Co.* In addition to this, they also carried on business at *Brighthouse, in Newfoundland*, under the like firm; and *Brown*, the plaintiff, was a partner in the house at *Brighthouse*, but not in the other houses. In *March, 1839*, the house of *Ferris, Butler, and Co. of Liverpool* wrote to the defendant in *London*, desiring him to effect insurances on the ship and cargo of the *Mary Ann*, their letter beginning, "You will insure for us the ship *Mary Ann*;" and in a subsequent part of the letter they said, "You are aware that she was built last fall for our house at *Brighthouse*." It was proved that the plaintiff was registered owner of $\frac{3}{8}\frac{1}{4}$ ths of the ship; and that the other partners in the *Brighthouse* house had the remaining shares, the shares of the partners in the ship being in the same proportion as their respective interests in the general property of the partnership. The ship had been purchased with the partnership funds of the house at *Brighthouse*. Some correspondence was also put in with a view

to show that the defendant must have been aware that there were other parties interested in the ship besides the *Liverpool* house of *Ferris, Butler,* and Co.

1842.
BROWN
v.
BRADFORD.

Knowles and *Tomlinson*, for the defendant, insisted that the plaintiff should be nonsuited; the action could not be maintained in the name of *Brown* alone, and the nonjoinder of the other members of the *Brighthouse* firm entitled the defendant to a verdict on the first issue. It might be contended that the ship belonged to the members of the *Brighthouse* firm as *part-owners*, and that on that account each might sue for his own share, *Breake v. Douglas* (a); but that case had virtually been overruled by *Hatsall v. Griffith* (b), and they referred also to *Suart v. Welch* (c); besides which, the parties here were not only part owners but partners, and the money, when received, would be subject to a partnership accounting.

Dundas and *Watson*. It is a principle of insurance law, that the insurance follows the interest. As soon, therefore, as the policy was effected, each became insured for his separate interest; indeed, neither at law nor in equity could the ownership of a ship be recognized, except so far as vouched

(a) Cited by *Parke B.*, 2 C. & M. 681. A report of this case is given in a note to *Suart v. Welch*, 4 M. & Craig. 320.

(b) 2 Cr. & M. 679.

(c) 4 M. & Craig, 305.

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by the registry. Possibly the *Liverpool* house, who gave the order, might have sued, they having given the orders as agents; but that does not show that the real owner may not also sue according to the rate of his interest. *Breake v. Douglas* has never been overruled, and must be considered as good law. *Hatsall v. Griffith* is distinguishable, for that was the case of an action for the proceeds of the ship, which having been sold by all (or by one as agent for all), the price became the property of all.

Knowles. There is no real distinction between *Breake v. Douglas* and *Hatsall v. Griffith*, and the latter case must be considered as having overruled the former; but *Hatsall v. Griffith* is an express authority in favour of this objection, it being indeed manifest, that if the owners of the ship must concur in suing for the proceeds of the ship, so they must sue together for the proceeds of the insurance.

ROLFE B. It struck me at first that this case might, on principle, be distinguished from *Hatsall v. Griffith*; but, on consideration, I think the two cases are the same, and I shall direct a nonsuit.

Dundas declined to be nonsuited, preferring to have a verdict entered against him on the 1st issue, with liberty to move. *Knowles* therefore went to the jury on the 2d, 3d, and last issues, which the

jury found for the defendant, and it became therefore unimportant to move the court on the 1st issue.

1842.
BROWN
v.
BRADFORD.

Dundas and Watson for the plaintiff.

Knowles and Tomlinson for the defendant.

FLETCHER, Public Officer, &c. v. CROSBIE, *April 2 & 3.*
GILHAM, COOPER, RALPH, and Forty-
six others.

THIS was an action of *Assumpsit* brought by a copartnership of bankers called "The *Phœnix* Bank," against the defendants, fifty in number, as shareholders in a mining company, called "The British Mining Company," to recover a balance of 6,900*l.* advanced by the *Phœnix* Bank to the Directors of the Mining Company. The *Phœnix* Bank had, in the first instance, brought an action against the two defendants, *Crosbie* and *Gilham* alone, when *Gilham* suffered judgment by default, and *Crosbie* pleaded in abatement the nonjoinder of the other forty-eight parties. The *Phœnix* Bank thereupon discontinued that action, and commenced the present action against *Crosbie* and *Gilham*, and the forty-eight other persons whose nonjoinder had been pleaded in abatement. In this action *Crosbie* and *Gilham*, and twenty-nine of the other defend-

On the trial of a cause it is in the discretion of the Judge to say in what order the counsel for different defendants, having different interests, shall cross-examine and address the Jury. The order of seniority is not imperative.

1842.
FLETCHER
v.
CROSBIE
and Others.

statute, be liable to the costs of such of the defendants as might turn out to have been without cause included in the present action by reason of *Crosbie's* plea in abatement, that person had a clear interest in establishing the liability of the defendants, and a right therefore to cross-examine on that point.

ROLFE B. ruled that *Crosbie* was at liberty to cross-examine generally, as well with a view to establish the liability of the other defendants, as to reduce the amount of damages. *Watson* accordingly continued his cross-examination.

At the close of the plaintiff's case, a discussion arose amongst the counsel who represented the different sets of defendants, as to the order in which they ought to address the jury; *Watson* submitting that the ordinary course should be followed, according to which he, as junior counsel, would address the jury last, while *Baines* and *Wortley* for the other defendants contended that *Watson* ought to begin, for that if not, he would have an opportunity of replying upon the other defendants, although they called no evidence.

ROLFE B. I think that result would be inconvenient and unjust towards the other defendants, and upon the whole I think the fairer course will be for *Mr. Watson* to address the jury first, and

then the counsel for the other defendants according to their order of precedence.

1842.
FLETCHER
v.
CROSBIE
and Others.

Watson accordingly first addressed the jury for *Crosbie*, and then *Baines* and *Wortley* addressed them on behalf of their respective clients. No evidence was called for any of the defendants.

Verdict for the plaintiff for the full amount claimed against all the defendants except *Ralph* and four others, as regarded whom there was no evidence of their being shareholders. (a)

Knowles and *Crompton* for the plaintiff.

Baines and *Warren* for *Cooper* and several other defendants.

Wortley and *Cowling* for *Ralph* and several others.

Watson for *Crosbie*.

The other defendants were undefended.

(a) A rule was obtained in Easter Term calling on the plaintiff to show cause why the verdict should not be set aside. No objection was made to the ruling of the learned baron respecting the cross-examination, or the order in which the counsel of the several defendants addressed the jury. The rule was afterwards discharged.

1842.

WINCHESTER.

Coram COLERIDGE J.WINCHESTER,
*Feb. 26.*CASTLEMAN *v.* HICKS.

An action on
2 *W. & M.*
c. 5. to re-
cover treble
damages for
pound breach,
is not a penal
action within
21 *Jac. 1. c. 4.*
s. 4.; and since
the new rules
the defendant
cannot dispute
the matters
alleged in the
declaration by
way of induce-
ment, without
a special plea.

ACTION on *st. 2 W. & M. sess. 1. c. 5. s. 4.* to re-
cover treble damages for a pound breach.

The declaration stated that *W. Stone* held a certain farm as tenant to the plaintiff at a certain rent, that rent was in arrear, and certain cattle were taken in distress and impounded on the premises, and that the defendant went to the pound and removed the cattle.

Plea, not guilty by statute.

The plaintiff's case was concluded without any proof of the tenancy, or of rent being in arrear, as alleged in the declaration; but proof was given of the distress and pound breach merely.

Crowder for the defendant objected that the defendant must be nonsuited on the ground, that this being a penal action was not within the new rules, and the general issue put the whole declaration in issue.

Erle for the plaintiff: This is an action on a re-

medial statute, not an action for penalties. The statute gives treble damages as such, not any fixed penalty.

1842.
CASTLEMAN
v.
HICKS.

COLERIDGE J. I think this cannot be considered a penal action within the *stat. 21 Jac. 1. c. 4. s. 4.* This is a statutable remedy, superadded to a common law right of action, and gives damages; the defendant ought therefore under the new rules to have pleaded specially.

The case went to the jury on the fact of the pound breach.

Verdict for the defendant. (a)

Erle and *Butt* for the plaintiff.

Crowder and *Bere* for the defendant.

(a) See *Earl Spencer v. Swannell*, 3 M. & W. 154.; and *Faulkner v. Chevell*, 10 A. & E. 76.

SALISBURY.

Coram ERSKINE J.

CHANDLER *v.* HORNE.

CASE for slander.

SALISBURY,
March 4.

The witnesses were all ordered out of Court; but one of the witnesses called for the plaintiff ad-

Where a witness remains in court, after an order that the witnesses shall leave the

court, his testimony cannot on that ground be excluded: it is only matter for observation on his evidence.

1842.
CHANDLER
v.
HORNE.

mitted that he had been in Court during the whole case. Upon which *Hodges* for the defendant contended that he ought not to be examined.

ERSKINE J. said, It used to be formerly supposed that it was in the discretion of the judge whether the witness should be examined. It is now settled and acted upon by all the judges that the judge has no right to exclude the witness ; he may commit him for the contempt, but he must be examined ; and it is then matter of remark on the value of his testimony that he has wilfully disobeyed the order.

Verdict for the plaintiff.

Erle and *Butt* for the plaintiff.

Hodges for the defendant.

CASES
 ARGUED AND DECIDED
AT NISI PRIUS
 IN THE COURTS OF
QUEEN'S BENCH AND EXCHEQUER,
 AT THE SITTINGS AFTER
EASTER AND TRINITY TERMS, 5 VICT.

QUEEN'S BENCH.

The Queen. Christian
HC 2 Crim C. 94.

REGINA v. GOLDE.

THIS was an indictment under the 7 & 8 G. 4. c. 29. s. 49., and it charged that one *Ann Field* had entrusted the defendant as her broker and agent with a certain security for the payment of money, to wit a bill of exchange for the payment of 200*l.*, with a direction in writing to get the same cashed, and that the defendant afterwards, in violation of good faith and contrary to the purpose specified, converted to his own use and benefit the said bill of exchange, &c.

1842.

GUILDHALL,
June 30.

An indictment on stat. 7 & 8 G. 4. c. 29. s. 49. against a broker for embezzlement of a security for money, must allege a written direction to him as to the application of the proceeds.

It appeared that *Ann Field* had received the bill from her brother-in-law abroad, with directions to

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 REGINA
 v.
 GOLDE.

send it to the defendant to get it discounted for him. She enclosed it in a letter, desiring him to endeavour to get it cashed as soon as possible. The letter was put in, and it was stated for the prosecution that the defendant, instead of getting the bill cashed at all, passed it in payment of a debt of his own. Whereupon it was objected by *Platt* for the defendant, that the indictment could not be sustained. The words of the act are, "That if any money or security, &c., shall be entrusted to any banker, broker, &c., with any direction in writing to apply such money, or the proceeds of such security, *for any purpose specified in such direction*, and he shall, in violation of good faith, and *contrary to the purpose so specified*, in any wise convert to his own use, &c., then, &c." These words require a written direction to the broker as to the disposal of the money or proceeds of the security; here there is none such, but only to get the bill cashed. It is true that the clause provides for the embezzlement of the security itself, but that is only in the case of a security received with such directions as the act points out as to the proceeds.

Lord DENMAN C. J. The clause is very loosely drawn, but I think that is the proper construction, and that the indictment cannot therefore be supported.

Verdict, Not Guilty.

Humfrey for the prosecution.

Platt and *Clarkson* for the Defendant.

1842.

EXCHEQUER.

LAWSON and Another assignees of SHEP- GUILDHALL,
 PARD and Another, Bankrupts, v. MANGLES May 16.
 and Another.

THIS was an action of debt. The declaration contained indebitatus counts for use and occupation, money paid, and on an account stated, alleging the defendants to have been indebted to the bankrupts before the bankruptcy.

The defendants pleaded (except as to 200*l.*) that they never were indebted, and as to the 200*l.* payment before action brought.

The venue was originally laid in *London*, and the defendants having changed the venue after declaration, and before plea, on the common affidavit, the plaintiffs had restored the venue on an undertaking to give material evidence in *London*. The undertaking was so given before the defendants pleaded.

The plaintiffs sought to comply with the undertaking by putting in the fiat and appointment of assignees, which had been enrolled in the Court of Bankruptcy, in the city of *London*; and also by putting in a summons taken out by the defendants for leave to amend their pleas by pleading a payment into Court of 150*l.*, which summons had been

When the venue is before plea brought back to the original county, on an undertaking to give material evidence in that county, the undertaking is satisfied by evidence in that county, going to support any traversable allegation in the declaration. A summons for leave to pay money into court is some evidence of a liability to that extent.

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 Another
 v.
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 and Another

served by the defendants, at the office of the plaintiffs' attorney, in Size Lane, in the city of *London*, after the issue was joined and notice of trial given.

M. D. Hill objected that the proceedings in bankruptcy were not material, no issue being raised as to the bankruptcy; and he also urged that a summons for leave to amend the pleas was no evidence to affect the issues raised on the existing pleas.

Thesiger, contra, as to the proceedings in bankruptcy, relied on *Cockerell v. Chamberlayne*. (a) He also cited *Soulsby v. Lea*. (b) And as to the summons, he cited the judgment of TINDAL C. J. in *Williamson v. Henley* (c) as shewing that taking out a summons for leave to pay money into court operates as an admission of liability to the extent of the money sought to be brought into court, upon the counts in respect of which the payment is intended to be made.

PARKE B. I think the undertaking is satisfied by the proceedings in bankruptcy, which are put in. The undertaking having been given before plea pleaded had reference to the declaration, and any evidence that would have been material to support the cause, or right of action, alleged in the

(a) 1 Taunt. 518.

(b) 3 Taunt. 86.

(c) 6 Bing. 305.

declaration, if such cause or right had been traversed by the defendants' pleas, is sufficient to satisfy the plaintiffs' undertaking, though the defendants have not by their pleas put such right of action in issue. If the defendants had denied the bankruptcy by pleading, the proceedings in bankruptcy would have been necessary evidence.

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 LAWSON and
 Another
 v.
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 and Another.

His Lordship, in summing up to the jury, told them that the summons for leave to pay 150*l.* into court was some evidence of liability to that extent, but was not conclusive.

The plaintiffs had a verdict.

C. Saunders and *Hugh Hill* for the plaintiffs.

M. D. Hill and *E. James* for the defendants.

PERRING *v.* REBUTTER.

WESTMINSTER,
June 22.

THIS was an action on the case against the defendant as a special pleader.

The declaration alleged that the defendant carried on the business and profession of a special pleader, and had taken out a certificate as such, and undertook to advise on matters of law, and to draw and advise on the proper pleas to be drawn to actions, for fees and reward in that behalf, whereby it became his duty to use due diligence, &c. That a certain action had been brought

Semble, an action cannot be supported against a certificated special pleader, for negligence, or unskilful advice, in the course of his profession.

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PERRING
v.
REBUTTER.

against the plaintiff, and the defendant was retained and employed by him to advise on the proper plea and defence to be made, and so negligently conducted himself, and misadvised the defendant (alleging the steps advised by the defendant), that the defence failed. The declaration alleged that the defendant was not nor ever had been a barrister.

Pleas, 1st, Not Guilty, and other pleas traversing the material allegations of the declaration.

On the case being called on,

Lord ABINGER C. B. said he had read the declaration and did not see how this action could be maintained. Such an action was certainly not maintainable against a barrister, and in his opinion there was no distinction between the case of a barrister and that of a certificated special pleader.

Upon this intimation of his Lordship's opinion, a conference took place between the counsel, and the case was settled by withdrawing a juror.

Erle and *Barstow* for the plaintiff.

Kelly and *Peacock* for the defendant.

1842.


SUMMER ASSIZES, 6 VICT.*Coram* Lord DENMAN C. J.

REGINA *v.* WILKINSON.DURHAM,
July 12.

INDICTMENT for not paying costs in obedience to an order of sessions.

The defendant was a rate-payer of the parish of *Hartlepool*. The township of *Hartlepool* having adopted the provisions of the "Lighting and Watching" Act (3 & 4 W. 4. c. 90. s. 8.), inspectors were appointed under s. 17., who issued an order on the overseers under s. 32. for levying money for the purposes of the act. The defendant refusing to pay his portion of the rate, an order was on the 24th of *November* 1841 made upon him for payment thereof by two justices, on the application of the inspectors (s. 38.). Against this order the defendant appealed to the quarter sessions held in *January* 1842 (s. 66.). The appeal was entered on the first day of the sessions; on the second day, both appellant and respondent being present by their counsel, the notice of appeal to the inspectors was admitted, but it was objected that notice should also have been given to the two magistrates; and the sessions, after hearing the appellant upon that point, adjudged the objection to be fatal, and dismissed the appeal on that ground, giving costs

Where an appeal against an order for payment of money under the *Lighting and Watching Act* is duly entered at the sessions, and afterwards dismissed, after hearing counsel, on the ground that notice of the appeal had not been given to the magistrates making the order, though it had been given to the inspectors, the sessions cannot award costs to the respondent, *the matter of the appeal not having been heard and determined.*

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SIMPSON
v.
THORETON.

of a letter to the defendant, and that previously to the delivery he had made a copy of it, by putting it in a machine, which pressed down a sheet of unsized paper on the ink, and so took an impression,

Murphy Serjt., for the defendant, asked the witness if he had compared the copy with the original? and on being answered in the negative, he objected to the copy as secondary evidence, mentioning an unreported *Nisi Prius* case, in which he said it had been ruled that a copy taken by a machine was not admissible evidence, unless it had been compared with the original.

MAULE J., asked if the witness himself worked the machine at the time the impression was taken? and the witness answering that he did, his Lordship admitted the copy as secondary evidence.

Verdict for the plaintiff. (a)

Venables and *Blackburn* for the plaintiff.

Murphy Serjt. and *Crompton* for the defendant.

(a) See *Nodin v. Murray*, 3 Campb. 228.; *Rex v. Watson*, 2 Stark. 129.

1842.

DEVIZES.

Coram CRESSWELL J.STEVENS *v.* CLARK.

DEVIZES.

TRESPASS for false imprisonment.

Plea, not guilty, by statute.

A warrant of commitment is not evidence of the facts which it recites.

The defendant was a magistrate of the county of *Wilts*, and had issued his warrant under the Vagrant Act 5 *G.* 4. *c.* 83. against the plaintiff for an indecent exposure of his person, upon which the plaintiff was apprehended and imprisoned for two hours, and then discharged. The warrant was regular on the face of it, and recited an information on oath, made by *A. Noble*, but it was insisted for the plaintiff that, in fact, no information on oath had been regularly made. It appeared on cross-examination of the plaintiff's witnesses, that *A. Noble* had made a complaint to the magistrate, which was taken down in writing, and that she was sworn to it, and the warrant thereupon issued, but the deposition was not produced nor called for by the plaintiff.

Erle for the defendant, submitted that the warrant being good on the face of it was a justification, and unless the plaintiff disproved the fact of an

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STEVENS
v.
CLARK.

information on oath, the facts alleged in the warrant must be taken to be true, the same as on a conviction, especially as it was sworn that some information was taken on oath, which the plaintiff ought to call for and put in.

CRESSWELL J., after inquiring whether there was any authority for holding that a warrant was evidence of the truth of its recitals, said, that in the absence of any such case, he was of opinion that it was no proof of an information on oath, and unless the defendant produced one the plaintiff would be entitled to a verdict.

Verdict for plaintiff,
1s. damages.

Crowder, Bere, and Merewether for the plaintiff.
Erle and Moody for the defendant.

CASES

ARGUED AND DECIDED

AT NISI PRIUS

IN THE COURT OF
QUEEN'S BENCH,
AT THE SITTINGS AFTER
MICHAELMAS TERM, 6 VICT.

QUEEN'S BENCH.

KEMP v. KING.

CASE for maliciously, and without probable cause, issuing out a commission of bankruptcy against the plaintiff.

Plea, not guilty.

For the plaintiff, an attorney was called under a *subpœna duces tecum*, and asked to produce a deed of assignment. The attorney objected, on the ground of a lien which he had on the deed for costs due from the plaintiff, for whom he had drawn this deed.

Erle contended that he was bound to produce the deed.

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Suffolk & Gilders
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WESTMINSTER,
Dec. 7. *Hopkins*

An attorney *Lidell*
having a lien *24. L. S. M. S.*
on a deed for *ccy. 691.*
the costs of *S. C. 7 & 8.*
drawing it, is *Mr. C. G. 331.*
not bound to
produce it on
a *subpœna* *Ex p. Raine*
duces tecum, *& Clayton*
for the client. *4 Ch. 2p 215*

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 KEMP
 v.
 KING.

LORD DENMAN C. J. ruled that the attorney was not bound to produce the deed.

Nonsuit. (a)

Erle and Brett for the plaintiff.

Kelly and Bramwell for the defendant.

(a) *Thompson v. Mosby*, 5 C. & P. 501.; and *Starkie* on Evidence, 86.

WESTMINSTER,
 Dec. 9.

KENDILLON v. MALTBY.

An action will not lie against a magistrate for words spoken in pronouncing judgment, of a witness in the case.

THIS was an action on the case. The declaration stated that the plaintiff was a constable of the Metropolitan Police Force; the defendant a magistrate of the metropolitan district: that, on the 10th of June, 1841, a certain information and complaint was heard before the defendant, on which the plaintiff appeared as a witness; and on the 29th of June, 1841, a certain other information, and in which the plaintiff also appeared as a witness, was heard, upon which occasion the defendant, in pronouncing judgment, falsely and maliciously, and without probable cause, said "I feel bound to state that in this, as on a former occasion, a few days since, I do not believe *Kendillon* on his oath without confirmation;" whereby the plaintiff was injured in his good fame and reputation, and by reason, and in consequence, of the saying of the said words, the Commissioners of Police dismissed him from his office as such constable. The fact of the two informations having been heard was proved

on the part of the plaintiff. In the first he had complained of a person for assaulting him in the execution of his duty; and upon the hearing, other witnesses were produced who contradicted the plaintiff, and the complaint was dismissed. In the second, he made a similar complaint against two individuals, and the hearing was postponed for the purpose of procuring other witnesses, who confirmed him as to one of the individuals, whom the defendant fined, and dismissed the complaint as to the other. On pronouncing judgment the defendant uttered the words set out.

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KENDILLON
v.
MALTRY.

Sir. *W. Follett*, besides objections as to the want of notice and insufficiency of the proof of special damage, which was, at all events, essential to the action, submitted that no action could be maintained for words spoken by the defendant in his judicial capacity; that the privilege was common to all judges, and absolutely necessary to the due execution of their office. Here the words spoken were clearly relevant to the matter before the magistrate, and there was no proof of malice. He cited *Holroyd J.'s* judgment in *Hodgson v. Scarlett*. (a)

Kelly, for the plaintiff, relied on certain expressions used by the magistrate, besides those set out in the declaration, as proof of malice; and contended that, at all events, he had no right to go

(a) 1 B. & Ald. 232.

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 KENDILLON
 v.
 MALTRY.

out of his way to pronounce an opinion on a bygone matter.

LORD DENMAN C. J. No judge has any immunity for slander; and if he goes out of his way to calumniate an individual by uttering charges not warranted by the occasion, he is answerable: but here I am decidedly of opinion, that what the defendant said was clearly within the sphere of his duty; and there is not a particle of evidence to show any malice against the plaintiff, whom the defendant is not even shown to have ever seen or known except on the occasions spoken to. It appears to be the practice and duty of the inspectors of police to attend before the magistrates to report to the commissioners all charges and instances of misconduct of any of the force under them, coming within their knowledge. The magistrates are proper judges of the conduct of the individuals of that force in cases coming before them, and are bound to pronounce their opinion in such a way as to lead to inquiry in cases of misconduct appearing before them. I think there is no evidence of any malice to go to the jury, and the plaintiff must be nonsuited.

Nonsuit.

Kelly and Clarke for the plaintiff.

Follett, S. G., Thesiger and Martin for the defendant.

In 11.2.13.2.
608
See Note 1/4/1.
See Note 2/4/1.

SPRING ASSIZES, 6 VICT.

YORK.

Coram PARKE B.

1843.

YORK,
March 8.

DOE on the demise of ROBINSON v. HINDE.

THIS was an ejectment brought to recover the possession of a piece of land containing three fourths of an acre called the *Grindstone Close*, situate in the township of *Dalton* in the parish of *Kirby Ravensworth*.

The defendant claimed title to it under the overseers of the township; and it appeared that in former times the township officers had been accustomed to let the oldest poor inhabitant occupy the land, there being an old grindstone upon it which he kept in repair, and of which the inhabitants generally made use at their pleasure; and it was proved that rent had been paid to the township by some of the former occupiers, but it did not appear how the land came to be first vested in the township.

The lessor of the plaintiff was the heir-at-law of the last occupier who held the close from 1812 to 1839, during all which time he held it without payment of rent, or any recognition of title or interest in the township, or any other party, except

Where the overseers of a township claimed lands which they had allowed a poor inhabitant to occupy rent free, he keeping up a grindstone upon the land for the convenience of the parish; the enjoyment of this privilege by the parishioners, for upwards of twenty years, whilst the lands were occupied by persons paying no rent, does not defeat the title of such persons under 3 & 4 W^m 4. c. 27.

Decd. Edw. 7. 23. & 24. 25.

 CARLISLE.

 Coram ROLFE B.

1843.

 CARLISLE,
 March 15.

 REGINA v. THE INHABITANTS of the
 Township of GREAT BROUGHTON.

A Judge at *Nisi Prius* is empowered by statute 5 & 6 W. 4. c. 50. s. 95. to make an order for payment of the costs of the prosecution, though the indictment had been removed from the sessions by *certiorari*.

INDICTMENT for non-repair of a highway.

Plea: That one *Moses Mossop* was liable to repair the road *ratione clausuræ*.

Replication: That the inclosure had been removed by *Mossop* before the said time when &c.

The indictment had been preferred at the Quarter Sessions, in consequence of an order of Justices under section 95. of the Highway Act (5 & 6 W. 4. c. 50.), the surveyor of the township having appeared before the Justices and denied the liability of the township. The prosecutor afterwards removed the indictment into the court of Queen's Bench by *certiorari*.

The Jury having found the defendants *guilty*,

The prosecutor now applied to the learned Judge for an order on the township to pay the costs out of the rate pursuant to the statute.

It was suggested by the defendants, that as the prosecutor had removed the indictment by *certiorari*, the learned Baron had no jurisdiction; but on being referred to the words of the statute, and to the case of *The Queen v. The Inhabitants of*

Preston (a), his Lordship made the order on the back of the indictment.

Armstrong and Robinson for the prosecution.
Temple and Atherton for the defendants.

1843.
REGINA
v.
INHABITANTS OF
GREAT
BROUGHTON.

(a) 7 Dowl. 593.

In the case of *The Queen v. the Inhabitants of Heanor*, (tried before Lord Chief Justice TINDAL at the spring assizes 1844, for the county of *Derby*.) the defendants were indicted for the non-repair of a highway. The indictment had been preferred at the quarter sessions by direction of two justices, under s. 95. of the Highway Act, 5 & 6 W. 4. c. 50., and removed by the defendants by *certiorari*. The defendants were acquitted on the ground that the road was not a highway. The prosecutor thereupon applying to the Lord Chief Justice for an order for payment of the costs of the prosecution under s. 95., his Lordship expressed some doubt, whether, under the circumstances, he ought to make the order, and said he would not do so until he had further considered the matter. In the course of *Trinity* term 1844, his Lordship heard the point argued by *Willmore* on the part of the prosecution, and *Whitehurst* for the defendants; when *Whitehurst* urged the great hardship of fixing the parish with the payment of costs, when it turned out they had not been guilty of any default; and contended that the words of the act only applied to cases of non-repair of a *highway*, which the road now in question was found not to be; and he said that it had been so ruled by PATTESON J. in *Rex v. Inhabitants of Chedworth*. (b) TINDAL C. J. (after hearing *Willmore* in support of the application) said, he was of opinion that the words of the Act were imperative on him to make the order; that the term "highway" was not to be understood here in its strict sense, but as including a road *considered* to be a highway; and that the object of the legislature appeared to be, that the prosecutor should be protected from costs, wherever he carried on the prosecution by the direction of the Justices. *Ex relatione Willmore*.

See 9. Jur. 105. d. c.
Where an indictment for non-repair of a highway is directed by Justices under 5 & 6 W. 4. c. 50. s. 95., the prosecutor is entitled to an order for costs, though the defendants are acquitted on the ground that the road is not a highway.
6. Q. d. c. 214
h. d. 745

Order made.

(b) 9 C. & P. 285; and see *Rex v. Inhabitants of Paul*, ante, p. 307.

YORK.

1843.

YORK,
March 21.

The QUEEN on the Prosecution of JOHN THOMPSON *v.* JOHN WALKER. The QUEEN on the Prosecution of JOHN FEARNEY *v.* JOHN WALKER.

A plea of *autrefois convict* of an assault before Justices under 9 G. 4. c. 31. is a bar to an indictment for felonious stabbing, &c., in the same transaction.

THERE were two indictments against the prisoner for feloniously stabbing, &c. The indictments were the same in both cases, except in the name of the person stabbed. The first count was for stabbing, cutting, and wounding with intent to maim, &c.; the second count, the same with intent to disable; and the third, the same with intent to do some grievous bodily harm.

It appeared that the prisoner had been taken before two magistrates, under 9 Geo. 4. c. 31. s. 27.; that both the present prosecutors gave evidence before the magistrates, and that as the two assaults were included in one and the same transaction, the prisoner had been fined in one joint sum of 5*l.* for the two assaults. The assault in each case had been made with a knife, and the prisoner was now indicted for feloniously inflicting the same wound for which he had before been fined by the magistrates as for a common assault.

On *Tuesday, March 21st*, the prisoner was ar-

raigned before PARKE B., whereupon *Pickering* tendered (*ore tenus*) a plea of *autrefois convict* to each indictment.

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REGINA
v.
WALKER.

PARKE B. I think the plea must be put in on parchment. If I were to decide the question on pleadings *ore tenus*, some objection might afterwards be taken to the plea when put in. I will give you till *Thursday* morning to plead.

On *Thursday* morning, *March* 23d, pleas engrossed on parchment were put in by *Pickering*, in the following form :

And the said *John Walker*, in his own proper person, cometh into court here, and, having heard the said indictment read, saith, as to the first count of the said indictment, that our said lady the Queen ought not further to prosecute the said indictment against him the said *John Walker*, in respect of the offence in the said first count of the said indictment mentioned, because he saith, that heretofore, to wit, on the 21st day of *February*, in the Year of our Lord 1843, at the parish of *Sheffield*, in the West Riding of the county of *York*, *John Walker* was, [upon the complaints to *George Chandler*, clerk, and *Henry Walker*, Esq., two of Her Majesty's justices of the peace, in and for the said West Riding, of *John Thompson* and *John Fearney*, being the parties aggrieved in that behalf, that the said *John Walker* had unlawfully assaulted and beaten them the said *John Thompson* and *John Fearney*, at the township

1843.
REGINA
v.
WALKER.

of Nether Hallam, in the said West Riding (which said complaints were made as aforesaid, within three calendar months after the commission of the said offence)] convicted before the said *George Chandler*, clerk, and the said *Henry Walker*, Esq., two of Her Majesty's justices of the peace in and for the said West Riding, for that he the said *John Walker* did, within three calendar months then last past, to wit, on the 11th day of *February*, in the Year of our Lord 1843, at the township of *Nether Hallam* in the said West Riding, with force and arms, &c., unlawfully assault and beat the said *John Thompson* and the said *John Fearney*, in the peace of our said lady the Queen then and there being, contrary to the statute in that case made and provided; and the said justices did adjudge the said *John Walker* for his said offence, to forfeit and pay the sum of 5*l.* of lawful money of *Great Britain*, and in default of immediate payment of the said sum of 5*l.* by the said *John Walker* as aforesaid, they, the said justices did adjudge the said *John Walker* to be imprisoned in the House of Correction at *Wakefield*, in the said riding, for the space of two calendar months, unless the said sum of 5*l.* should be sooner paid; and the said justices did direct that the said sum of 5*l.* should be paid to *Joseph Bower*, one of the overseers of the poor of the township of *Nether Hallam* aforesaid, in which township the said offence was committed, to be by him applied according to the directions of the statute in that case made and provided, as by the record of the

said conviction more fully and at large appears ; which said judgment and conviction still remains in full force and effect, and not in the least reversed or made void ; and the said *John Walker* further in fact saith that he the said *John Walker*, in the said first count of the said indictment mentioned, and the said *John Walker* so convicted as last aforesaid, are one and the same person, and not other or different ; and that the assault and battery of the said *John Thompson*, of which the said *John Walker* was so convicted as aforesaid, and the stabbing, cutting, and wounding of the said *John Thompson* in the said first count of the said indictment mentioned, are one and the same assault and battery, and not other or different ; and he the said *John Walker* further saith, that he the said *John Walker* hath duly paid the whole amount of the said sum of 5*l.* so adjudged by the said justices to be paid under the said conviction as aforesaid to the said *Joseph Bower*, so being such overseer of the poor of the said township of *Nether Hallam*, as aforesaid ; and this he the said *John Walker* is ready to verify, therefore he prays judgment if our said lady the Queen ought further to prosecute the said indictment against him, the said *John Walker* in respect of the said offence in the said first count of the said indictment mentioned, and that he the said *John Walker* may be dismissed and discharged from the same.

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v.
WALKER.

And as to the felony aforesaid in the said first

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count of the said indictment mentioned, the said *John Walker* saith he is not guilty thereof, and therefore he puts himself upon the country, &c.

The same plea was then pleaded, *mutatis mutandis*, to each of the other counts in the indictment.

Wilkins, for the prosecution, then tendered a demurrer, *ore tenus*.

PARKE B. As the plea is on parchment, I think the demurrer should be so likewise. It may be drawn up in the course of the day.

The prosecutor was allowed time until the following morning for drawing up his demurrer: on the same day, *Pickering* prayed time to amend his plea by inserting the words between the brackets [], *antè*, p. 447, 448.

Wilkins opposed the application, but PARKE B. said that as the proposed amendment did not affect the merits of the question at issue, but only tended to raise it with more certainty, he thought it should be allowed.

The amendment was accordingly made.

Wilkins suggesting that the amendment introduced a new fact, namely, a complaint by two persons, which he was not at present prepared to admit, time was given to the prosecutor until a

later hour in the day, to elect whether he would traverse the plea or demur.

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REGINA
v.
WALKER.

In the result, the prosecutor elected to demur.

The case came on this day, (Friday *March 24.*), before COLTMAN J., and on the demurrer being put in on parchment, *Pickering*, for the prisoner, was allowed to join in demurrer *ore tenus*, on the authority of *R. v. Sheen. (a)*

Wilkins, in support of the Demurrer. The plea is bad. The question is whether, under 9 G. 4. c. 31. s. 27, 28, 29., the Justices can have any jurisdiction in any case of felony. If not, the prisoner has never been in jeopardy for the offence with which he is now charged. Now, s. 27. only gives the Justices jurisdiction in cases of common assault; and if the parties charged before the Justices with a common assault be either acquitted or convicted of such assault, then by s. 28., they are to be released from all further proceedings, civil and criminal, "for such cause;" that is, in respect of the common assault with which they were charged. But this section cannot affect any subsequent charge for felony. Indeed, by s. 29. it is expressly enacted, that whenever the charge shows an attempt to commit a felony, or if it shows any matter over which they have no jurisdiction, the

(a) 2 Carr. & P. 634.

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 REGINA
 v.
 WALKER.

Justices are to abstain from deciding the case, and to order a prosecution. Suppose that the Justices choose to call that only a common assault which, in point of fact, is a felony, they cannot, by adopting such a course, give themselves jurisdiction. It is desirable that heinous crimes should be punished; and if a conviction or acquittal by Justices for a misdemeanor could be a bar to a subsequent charge for felony, the cognizance of such crimes would thus be transferred from the jury to magistrates.

But the plea as pleaded is bad. In the first place the conviction as set out is bad.

[COLTMAN J. I do not think you can take any objections of a *technical nature* to the conviction on this demurrer. They might of course be taken on appeal, but not when the record is pleaded as here.]

Then, on the face of the plea, it appears that the assault in the conviction was only a common assault; whereas that charged by the present indictment is an assault with a felonious intent: they are not therefore identical, and unless they are, the prisoner has never been in jeopardy before on this charge. Thus an acquittal for burglary with intent to steal is no bar to an indictment for stealing; and *vice versa*. So an acquittal as accessory is no bar to an indictment as principal, and *e converso* (2 Hale, 244.). An acquittal for manslaughter may be a bar to an indictment for murder; but there both the offences are felonies, and tried by the same

tribunal; and if the jury find the prisoner had no hand in the death of the party killed, that acquittal should of course be a bar to any indictment for murder. It is however mentioned in a note in *Dickenson's* Quarter Sessions, p. 186., that an acquittal of simple larceny is no acquittal of a compound larceny. At any rate where the offences are of a different degree, as felony and misdemeanor, an acquittal on one charge cannot be a bar to a charge of the other. (*Archbold's* Criminal Pleading, p. 84. 2 Hawk, c. 35. s. 5.). The case is stronger in case of a conviction than of an acquittal. It might be said that where a party is acquitted of an assault, he cannot be guilty of what are only the consequences of that assault; but where a party is found to have committed the assault, he may be guilty of the assault and of something more, viz. the felonious intent.

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Pickering, contra, in support of the plea. The plea is good. As to the offences not being identical, the demurrer admits that the assault mentioned in the indictment is the same assault as that mentioned in the conviction. The only question then is, whether the Justices had jurisdiction under the stat. 9 G.4. c. 31. s. 27. to negative the felonious intent, and convict the party of a common assault. Now the jurisdiction of the Justices depends on the nature of the complaint brought before them; *The Queen v. Bolton*. (a) The complaint was of a

(a) 1 Q. B. Rep. 66.

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common assault, and they were therefore bound to enter upon the enquiry; and if, in the course of that enquiry, it became a question whether the assault was accompanied with any felonious intent, they necessarily had jurisdiction incidentally to decide that question too. In *Anon.* (1 B. & Ad. 382.) a conviction under 9 G. 4 c. 31. s. 27. was brought up by certiorari to the Queen's Bench; and it was attempted to show by affidavits that the assault there complained of was accompanied with an attempt to commit a felony. But the Court held, that, as the conviction was regular on the face of it, and showed that the magistrates had jurisdiction, then, even supposing that it was a question before them; whether the assault was accompanied with any attempt to commit a felony, they had negatived such an attempt.

The general principle is this: wherever there has been a decision by a court of competent jurisdiction, that decision is conclusive upon the same subject matter, or on any other which necessarily involves the same point. Thus if a man be tried and acquitted in a foreign country, such acquittal will enure to his defence here; (*R. v. Roche* (a), Hawk, P. C. v. 2. c. 35. s. 4.) It is true that an acquittal of a prisoner as accessory is no bar to an indictment against him as principal; and *vice versa*; but the reason is that the two offences are perfectly distinct, and one cannot possibly involve the other.

(a) 1 Leach. 134.

And so, for the same reason, an acquittal of a burglary *with intent* to steal cannot be pleaded as a bar to an indictment for stealing. But if the burglary was laid with an actual larceny, a general acquittal includes an acquittal of the larceny itself. (1 Stark. Cr. Pl. 327.) The passage quoted from *Dickenson's* Quarter Sessions, p. 186., is at variance with the principles generally laid down in the books. (Stark. Cr. Pl. 322, 323.) Again, it is admitted on the other side that a conviction for manslaughter will be a good bar to an indictment for murder. (2 Hale, 246. ; Fost. 329. ; 1 Chitty's Cr. Pl. 462.) Yet on the charge for manslaughter only, how can it be said that the prisoner was in jeopardy for murder? That question was not before the jury, and the principle on which a conviction for manslaughter may be pleaded to an indictment for murder, viz. that a competent tribunal has decided that the prisoner was only guilty of the lesser crime, applies equally to the present case. It is a fallacy to say that *the charge* must be identical. In *Q. v. Gould*, 9 C. & P. 364. the prisoner was indicted for a burglary in the dwelling house of one *J. Templeman*, and it appeared in evidence that he had been tried and acquitted on a charge of murdering the person at the time when the burglary was alleged to have been committed ; and *Parke B.* told the jury that if the prisoner had been indicted for burglary *with violence*, the acquittal on the previous charge would, in his opinion, have been an answer to the charge of violence.

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But it is said that the principle cannot apply where the charges are different in degree, viz. where one is a felony and the other a misdemeanor. But the passage in 2 Hawk. c. 35. s. 5. does not support the position laid down by Mr. *Archbold*. If a party be indicted for a misdemeanor, and it appear by the evidence that that which is charged as a misdemeanor is in fact a felony, the right course, it is submitted, is this; that the jury should be discharged of the indictment, or a special entry should be made that the prisoner was acquitted *because* the misdemeanor was merged in the felony (Fost. 328. 304. ; Stark. Cr. Pl. 41. n. ; Q. v. *Cross*, 12 Mod. 520. 634.) ; and so, where a party is acquitted on the ground of the insufficiency of the indictment. (2 Hale, P. C. p. 248.) Again, on this very indictment, the jury may, under stat. 7 W. 4. & 1 Vict. c. 85. acquit of the felony and find the prisoner guilty of the common assault. In that case the prisoner would be twice punished for the same offence. So, it is a matter of history, that two years ago many persons were indicted for conspiracy and riot, where from the facts there was no doubt the offence amounted to high treason. Is it to be contended that their trial and punishment are a nullity, and that they are still liable on precisely the same facts to be indicted for high treason? The sole question is, had the justices jurisdiction to decide whether the assault was a common assault, or an assault with a felonious

intent? If it had been intended to deny the jurisdiction of the justices, the prosecutor should have pleaded, and not demurred.

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Wilkins, in reply. The justices cannot have jurisdiction over a felony, and great facility would be obtained for escaping due punishment for heinous crimes, if the doctrine now contended for by the prisoner was upheld by the court. It is true that the prisoner may, on this indictment, be found guilty of an assault; still that only affects *part* of the present charge, and the same evidence which was sufficient to support the *whole* of the former charge, would be insufficient to support the *whole* of the present charge.

COLTMAN J. I am of opinion that the justices had jurisdiction in this case. On a complaint for a common assault they were to determine whether such assault was accompanied with any felonious intention; on that question they have adjudicated, and their decision is final. They are like any other court of competent jurisdiction. It is the same as if the party had been convicted by a jury of the assault. I see no difference in principle whether a party has been convicted or acquitted. Suppose a party had been acquitted by a jury of an assault, and he was afterwards indicted for the felony which involved that assault; it is clear, if he did not make the assault, he could not be guilty of that which includes and depends upon the assault. There is

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10000
March 8. **KIRK & W. HILL and ANTELL**

[illegible]

The persons were indicted under the statute 7 & 8 Geo. 4. c. 21. s. 15. for breaking and entering "a warehouse," and stealing therein certain goods, as it is charged and shown that being therein.

It appeared that the prisoner occupied a shop in a street at Wighton, part of which opening into the street, he used as a shop for selling various kinds of goods. In a cellar, under the shop, and entered by descending a flight of steps from the street, he kept such goods as he had not at the time occasion to expose for sale in his shop, and

the goods mentioned in the indictment were in that cellar when the prisoner entered it, and stole them. There was no inner communication between the house and shop, or either of them, and the cellar.

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Another.

Greig, for the prisoner, contended that the indictment could not be supported, inasmuch as the cellar was not a place where the goods were exposed to sale; and he said that it had been decided that such a place was not what the law understood to be a *warehouse*. He cited *Rex v. Howard* (a) and *Rex v. Godfrey*. (b)

Bowstead said, those were cases under the old law, and that the statute of 7 & 8 *Geo.* 4. was intended to get rid of distinctions of this kind.

ROLFE B. said, that though the objection had been taken before, he never could understand the doubt. That a warehouse, in common parlance, certainly meant a place where a man stowed, or kept, his goods, which were not immediately wanted for sale; and there was no reason to suppose that the legislature used the term in this statute in a sense repugnant to its ordinary meaning. His Lordship further said, that the same objection had been taken before him at *York*, and both he and Mr. BARON

(a) Fost. 77.

(b) 1 Leach, 287.

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PARKE (whom he had consulted) were of opinion there was nothing in it.

The prisoner was convicted.

Bowstead for the prosecution.

Greig for the prisoner.

DURHAM.

Coram ROLFE B.

DURHAM,
 March 31.

REGINA v. FOLKES.

On an indictment for carnally knowing and abusing a girl under ten years, the prisoner may be acquitted of the felony and convicted of an assault.

INDICTMENT for carnally knowing and abusing a girl under ten years of age.

The jury acquitted the prisoner of the felony, but convicted him of an assault with intent, &c., whereupon he was sentenced to two years' imprisonment with hard labour.

It was afterwards suggested by the counsel for the prosecution, to ROLFE B., that doubts had been expressed by some of the Learned Judges whether on an indictment in this form the prisoner could be convicted of the assault under stat. 7 *W.* 4. & 1 *Vict.* c. 85. s. 11., and *Regina v. Banks* (a), was cited to that effect; and as there was another indictment found by the grand jury against the prisoner for an assault upon the prosecutrix with intent to commit a rape (and which indictment contained a count for a common

(a) 8 Carr. & P. 574.

assault), his Lordship was asked whether he deemed it advisable that the prisoner should be put on his trial upon that indictment.

The learned Baron, however, expressed himself to be clearly of opinion that the conviction was proper, and declined trying the prisoner on the other indictment.

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Otter for the prosecution.

The prisoner was undefended.

REGINA v. RICHARD COLLINS.

Reg. v. Chadwick
Inst 545 -
April 1.

THE prisoner was indicted for feloniously forging a certain deed purporting to be an indenture, bearing date the 31st day of *October* 1839, between one *Robert Hastings* of the one part, and *William Howson* of the other part, and purporting to be made and executed by the said *Robert Hastings*, with intent to defraud the said *Robert Hastings*. There were other counts laying the intent to defraud other parties. Fifth count, for feloniously forging a certain other deed purporting to be an indenture, bearing date the 1st of *November* 1839, between one *Robert Hastings* of the first part, *William Howson* of the second part, and *Richard Collins* of the third part, and purporting to be made and executed by the said *Robert Hastings* and *William Howson*, with intent to


It is not forgery fraudulently to induce a person to execute an instrument on a misrepresentation of its contents.— In an indictment for forgery, the instrument forged may be described as a deed without setting it out, or averring facts to show that it was such a deed as might be the subject of larceny.

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defraud *Robert Hastings* ; other counts stated the forgery to be of a certain deed purporting to be an indenture of release, bearing date 1st of *November* 1839, between &c., and purporting to be made and executed by the said *Robert Hastings* and *William Howson*, and whereby the said *Robert Hastings* purported to release his right and interest to and in certain tenements therein mentioned. There was also a count stating the forgery to have been of a certain *deed*, purporting to bear date 31st of *October* 1839, and purporting to have been made and executed by one *Robert Hastings* with intent &c.

The deeds alleged to have been forged were indentures of lease and release, bearing date respectively the 31st of *October* and 1st of *November* 1839 : the lease purporting to be between *Robert Hastings* of the one part, and *William Howson* of the other part ; the release, between *Robert Hastings* of the first part, *William Howson* of the second, and *Richard Collins* of the third part ; and when produced in evidence, the lease purported to have a seal on it, and the mark of *Hastings*, thus :

ROBERT  HASTINGS
 His ⌘ Mark.

and the release purported to be sealed and marked by *Hastings* in the same form as the lease, and also to be signed and sealed by *Howson* : the execution of both indentures by *Hastings* and *Howson* pur-

ported to be attested by two witnesses, *Elizabeth Howson* and *William Robson*; one of the indentures was proved to be in the handwriting of the prisoner, the other in the handwriting of another party, and the indentures purported to be an absolute conveyance in the way of gift by *Hastings* to *Collins*, as trustee for *Howson*, of certain freehold property, and also an assignment of a sum of 92*l.* in the 3 per cent. consols.

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Hastings was a freeman of *Durham*, entitled to the freehold property described in the deeds, and about seventy years of age at the time of the date of the deeds; he could neither read nor write, but was represented to be of a cautious character; he lived at *Durham*, and *Elizabeth Howson* (one of the attesting witnesses) attended upon him. *William Howson*, mentioned in the deeds, was her father, and related to *Hastings*; the prisoner had been an attorney's clerk, but at the date of the indentures he was a furniture-broker at *Sunderland*. *Robson*, the other attesting witness, being called by the prosecution, gave the following account of the transaction:—that he was well acquainted with *Hastings*; that on the 1st of *November* the prisoner called on him and asked him to go with him to old *Hastings* to get a deed executed; that he agreed to do so; that on their way the prisoner said, it was a deed of gift to *Howson*, who would have the best right to the old man's property, but that he intended to tell *Hastings* it was a requisition to call upon Mr.

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Lambton to come forward as a candidate for the representation of *Durham*; that they went together to *Hastings'* lodgings, where they saw the old man; that the prisoner said they had come to ask him for his vote, and had brought him a requisition to sign for the purpose of bringing another Whig candidate forward; that the prisoner laid the two deeds on the table, and asked *Hastings* to sign them; that he said he could not write, but would put his mark; that the prisoner said that would do as well, and pointed out the place where the mark should be put; that *Hastings* accordingly put his mark at the foot of the two deeds, he *Robson*, and *Elizabeth Howson* being present; that the prisoner and he then went away; that in the course of the same evening he was sent for to the house of the prisoner's mother, where he found the prisoner, *William Howson*, and *Elizabeth Howson*, and the prisoner induced them to subscribe to the attestation on the back of the deeds. *Elizabeth Howson* swore distinctly that there was no sealing-wax on the deeds when they were at *Hastings'* lodgings, and that she saw the prisoner put the seals on both deeds in the evening when she attested them. *Robson*, the other witness, saw *some* sealing in the evening, and had no recollection that any seal was on either deed when *Hastings* put his mark; and both of them positively swore that nothing was said in the presence of *Hastings* about *delivering* the deeds.

For the prisoner, on the other hand, a witness was called who swore positively that he saw the deeds in the prisoner's hands before any signature or mark had been placed on them, and that at that time he saw the seals on them.

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For the prosecution, it was contended that, even if the jury should think that the seals were on the deeds when *Hastings* put his mark, still the obtaining his mark in the manner described amounted to the crime of forgery ; that *Hastings* being unconscious of what he was doing could not be considered as having signed it at all ; that according to the doctrine of law on the subject of innocent agents, the signature by *Hastings* must be looked upon as the signature of the prisoner himself ; that if the prisoner had by the same stratagem induced *Hastings* to sign some third party's name, there could be no doubt that the prisoner, and not *Hastings*, would be the party criminally answerable ; and 2 *Russell* on Crimes, p. 319, and 2 *Deacon's* Crim. Law, p. 1402, were cited, where it was laid down, on the authority of 1 *Hawkins*, c. 70. s. 2., that if a solicitor being employed to prepare a will, inserts a bequest in it to himself, or some third party, and then gets the testator to execute the will, in ignorance of the fraudulent insertion of the bequest, the solicitor is in such case guilty of forgery.

For the prisoner, on the other hand, it was contended, that the obtaining of the signature of *Has-*

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tings to the indentures, under pretence of their being a mere requisition, did not amount to forgery, but only to a fraud, if the seals had been previously affixed; and they further argued that, even if the seals were afterwards affixed, the signature being genuine, though fraudulently obtained, no forgery had been committed.

ROLFE B. said he could by no means subscribe to the authority of the cases cited by *Russell* and *Deacon*, and his Lordship expressed a clear opinion, and so charged the jury, that if they thought the seals had been affixed previously to the mark of *Hastings* being obtained, and that they were on the deeds when he put his mark, the prisoner was entitled to be acquitted on this indictment, though liable to indictment for a very gross fraud; that if a different doctrine were laid down, the consequence would be that any party might be indicted for forgery who prevails on a man to execute a deed by misrepresenting its legal effect. On the other hand he was clearly of opinion that the prisoner was guilty of the crime imputed to him by this indictment if he obtained *Hastings'* mark to the parchments, and afterwards affixed the seals. There were three views, either of which it was possible to take of the transaction. The jury might come to the conclusion that *Hastings* had signed and sealed the deeds without any fraud or misrepresentation practised on him; or 2dly, they might think that the deeds had been signed by him after

they were sealed, but under the delusion that they were a mere requisition calling on a candidate to come forward to represent *Durham* ; lastly, they might think that the seals had been fraudulently affixed by the prisoner subsequently to their being marked by *Hastings*. If they thought the last hypothesis borne out by the evidence, they would convict the prisoner ; but in either of the two other hypotheses, the prisoner would be entitled to be acquitted.

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The jury found the prisoner guilty.

Granger and *F. Robinson* for the prosecution.
Temple and *Otter* for the prisoner.

The prisoner being called upon to receive sentence,

Otter objected that the indictment was bad on the ground that as none of the counts purported to set out the deed verbatim, it was necessary under the 2 & 3 *W. 4. c. 123. s. 3.*, that the deed should have been described in such a manner as would have sustained an indictment for stealing the same ; that as the deed purported to operate upon real property, it was not the subject of larceny at common law, but was only made so by the statute 7 & 8 *Geo. 4. c. 29. s. 23.* ; that under that statute the deed ought to have been described in the indictment as being evidence of the title of the

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person having a present interest in the estate on which the deed purported to operate.

Granger and Robinson for the prosecution answered, first, that the true construction of the statute is, that it shall be sufficient to describe the instrument with the same degree of particularity as would be necessary in an indictment for larceny of the same instrument, supposing the instrument had been the subject of larceny at common law: that this was the true construction, was obvious from the fact that the statute had been held to apply to instruments not the subject of larceny, as, for example, to the forgery of mere receipts, in which case it had been held that the indictment for forgery might either simply charge the prisoner with the forgery of a "receipt for the payment of money" in the words of the statute, or aver facts in the indictment shewing that the instrument was such a receipt. So here the statute enacting that any party who shall forge "any deed" shall be guilty of felony, it is sufficient (as in the last count of this indictment) to follow the words of the section. But there was another good answer to the objection, viz. that the indenture of release purported to convey personal property (viz. consols) as well as real property, and consequently larceny might have been committed of the deed at common law.

ROLFE B. overruled the objection, and refused to reserve the point. (a)

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COLLINS.

The prisoner was sentenced to fifteen years' transportation.

(a) See *R. v. Davies*, 2 Moody's C. C. 179.; *R. v. Robson*, id. 184.

Coram PARKE B.

REGINA v. ANDERSON.

LIVERPOOL,
April 3.

FALSE PRETENCES.

The prisoner had presented to a person of the name of *Fishbourne*, who was in the habit of discounting seamen's shipping notes, an instrument in the following form : —

“ In consideration of *Charles Fletcher* sailing as steward in the brig *Kezia*, from the port of *Liverpool*, I undertake to pay to *Charles Fletcher*, or bearer, the sum of 2*l.* 15*s.* five days after the said brig *Kezia* shall sail from the said port to *St. Thomas*.

“ Dated this 8th of *December* 1842.

“ *William Robinson*, Master.

“ At *Turner & Tomlines*, *Rumpland Street*, *Liverpool*.

“ Good voyage and safe return. 2*l.* 15*s.*”

stating to him that he had received it from the

the prisoner ought to have been indicted for forgery; and that an indictment for obtaining goods by false pretences could not be sustained.

A sailor's shipping note for 2*l.* 15*s.*, payable to *A. B.* or bearer five days after the ship shall sail, is not a void instrument, under 17 *Geo.* 3. c. 30., but is an “under-taking, warrant, or order for the payment of money,” under 11 *Geo.* 4. & 1 *W.* 4. c. 66. s. 3.

Therefore, where such an instrument was forged, and goods obtained by means of it, it was held that

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captain, and requesting him to advance the amount in cash and clothes: by this means the prisoner, who was known to *Fishbourne* by the name of *Fletcher*, obtained from him a sovereign, and the residue of the amount in clothes.

The note turned out to be a forgery.

Wilkins for the prisoner objected that the indictment for false pretences could not be maintained, citing *Reg. v. Evans. (a)*

Paget for the prosecution. This instrument is not the subject of an indictment for forgery: if it were genuine it would be void under sect. 1. of the 17th Geo. 3. c. 30., which enacts that "all promissory notes, bills of exchange, or drafts, or undertakings in writing, being negotiable or transferable," for any sum between 20s. and 5l., shall, unless they comply with the requirements of that act (which this instrument does not) be absolutely void. It is true that this is not a promissory note or bill of exchange, since it is payable on a contingency: but it is an undertaking in writing, and purports to be negotiable or transferable; it is therefore within the act, and *Moffat's* case (*b*) shews that the counterfeiting of an instrument, void by the provisions of that act, is not a felony under the statute; but if money or goods are obtained by means of such an instrument, the party obtaining

(a) 5 C. & P. 553.

(b) 1 Leach, C. C. 431.

them may be indicted for false pretences. *R. v. Freeth.* (a)

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Even admitting that the prisoner has been guilty of a felony by forging this instrument, the offence for which he is now indicted is distinct.

The felony is complete when the instrument is counterfeited ; the misdemeanour is not committed until the money is obtained by means of it : it is a subsequent, independent offence, and would not merge in the antecedent felony.

PARKE B. (after conferring with COLTMAN J.) This indictment cannot be sustained. The instrument is "an undertaking, warrant, or order for the payment of money," within the 11th *Geo.* 4. and 1st *W.* 4. c. 66. s. 3. *Bamfield's* case decides that (b) ; and it is not within the 17th *Geo.* 3. c. 30., which is confined to instruments which, but for that statute, would be negotiable or transferable. Neither by the custom of merchants, nor by statute, would this instrument be so, since it is payable on a contingency ; and the fact of its assuming to be so, by purporting to be payable to the bearer, does not make any difference ; the question is, whether it would be in fact negotiable or transferable, not whether it assumes to be so.

Had my brother COLTMAN felt any doubt upon the other point, I should have been disposed to reserve it, but he agrees with me in thinking that

(a) *R. & R.* 127.

(b) 1 *Moo. C. C.* 416.

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when a party commits a forgery, and subsequently obtains goods by the use of the forged instrument, the proper course is to indict for the felony.

The prisoner was acquitted.

Paget for the prosecution.

SALISBURY.

Coram CRESSWELL J.

March 4.

REGINA v. BEERE.

Where a juryman on a criminal trial is taken so ill as to be unable to continue, another juryman may be sworn with the eleven already on the trial, and the case proceed, the witnesses already heard being recalled.

THIS was an indictment for a felony.

After the evidence for the prosecution had been partly gone through, a juryman was taken with a fit, and was carried from the box. CRESSWELL J. required it to be proved on oath before him, by a medical man, that the juryman was unable further to attend the trial, and then desired another juryman to be sworn in his stead (giving the prisoner and the other prisoners who had been arraigned with the prisoner, their challenges), and each witness who had been previously examined was recalled into the box, and resworn, and the judge read over to him the note of his evidence and asked if it was correct. The trial then proceeded, and the prisoner was convicted.

Slade for the prisoner.

1843.

TAUNTON.

Coram CRESSWELL J.

REGINA v. HURLEY.

March 16.

THE indictment charged the prisoner with forging a certain warrant and order for the payment of money (viz. a banker's cheque, purporting to be drawn by *Mary Ann Parish*) with intent to defraud *Mary Anne Parish*; a second count stated the intent to be to defraud Messrs. *Tugwell, Mackenzie* and *Tugwell*, the bankers on whom the cheque was drawn. There were counts for uttering, varying the intents in like manner.

On an indictment for uttering a forged cheque, &c. it is sufficient to disprove the handwriting of the supposed maker; and he need not be called to disprove an authority to others, to use his name; circumstances showing guilty knowledge are enough.

The case for the prosecution consisted of various facts, tending to show that the prisoner uttered the cheque with a guilty knowledge that it was a forgery; and the hand-writing of *Mary Anne Parish* was disproved by the evidence, but she was not called, though alive, and within reach of a subpœna.

At the close of the case for the prosecution, the counsel for the prisoner objected that there was no evidence on any of the counts of the indictment to go to the jury. The prosecutor is bound to make out his case, and not only to negative, but to exclude every inference consistent with, the prisoner's innocence. It is perfectly consistent with this evidence that, admitting the cheque not to be in Mrs. *Parish's* hand-writing, she may have given

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the prisoner, or some one else, authority to subscribe it in her name. She ought to be called to negative that supposition. The practice before 9 G. 4. c. 32. s. 2. is in favour of this view, for it was frequently necessary that the prosecutor should be released in order that his evidence might be obtained. In Captain *Smith's* case, (a) it was held that the person whose hand-writing was supposed to be forged should be called, as he was the best evidence of the fact; and it seems to have been so, not because his hand-writing might not have been disproved by others, but because he alone could prove that which was essential to constitute it a forgery, viz. that it was done without his consent. [CRESSWELL J. That objection is never once alluded to in the case. What do you say to the case of the bank prosecutions? (b)] That is distinguishable. There it was held that to prove the forgery of a bank note the signing clerk himself need not be called. But as he could not delegate his authority, being merely deputed to sign, without the power of allowing others to do it, it must be presumed that he did not do that which by the nature of his employment he could not do lawfully. *Delegatus non potest delegare*. In that case the forgery of the signature is only one among many elements to prove the note a forgery. The paper and the water-mark are always resorted to. In the case of a cheque there is no guide but

(a) 2 East, P. C. 1000.

(b) R. & R. C. C. 378.

the hand-writing. There is no evidence of the prisoner having written this cheque. Some one else may have written it with Mrs. *Parish*'s authority, and he may have received it innocently.

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CRESSWELL J. Assuming the cheque to be forged, there is evidence from the prisoner's conduct to show guilty knowledge ; and it being proved not to be in Mrs. *Parish*'s hand-writing, the same facts may be used to show that Mrs. *Parish* did not authorise the use of her name, and that the prisoner was aware of that fact.

The learned Judge declined to reserve the point on the application of the prisoner's counsel.

The prisoner was convicted, and sentenced to fifteen years' transportation.

Rogers Q. C. and *Merewether* for prosecution.
Slade and *Phinn* for the prisoner.

REGINA v. COLLEY and OTHERS.

March 16.

THIS was an indictment for feloniously setting fire to a stable.

The evidence was that the building was built for, and had been used as, a stable, but for eight years had been built for and used as a stable originally, but had latterly been used as a lumber shed only.

An indictment for burning a stable is not supported by proof of burning a shed which had

THE STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO, ss. I, the undersigned, Judge of the Superior Court of the County of San Francisco, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears from the records of the Court.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the Court at San Francisco, California, this 10th day of February, 1910.

 JUDGE OF THE SUPERIOR COURT

 DEED

WHEREAS, the within and foregoing is a true and correct copy of the original as the same appears from the records of the Court.


THE DEEDS WERE MADE FOR THE PURPOSE OF
 THE STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO, ss. I, the undersigned, Judge of the Superior Court of the County of San Francisco, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears from the records of the Court.

THE INDICTMENT WAS FRAMED UPON THE 2 & 3 FID.
 C. S. S. N. 10.
 THE STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO, ss. I, the undersigned, Judge of the Superior Court of the County of San Francisco, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears from the records of the Court.

The indictment was in the following words :—
The jurors, &c. upon their oath, &c. that *William Trevenner*, late, &c. and *William Treleage*, late, &c. being persons employed in a certain mine within the county of *Cornwall*, that is to say, in a certain mine called *Carn Brea* mine, in the parish aforesaid, in the county aforesaid, on the 13th day of *January*, 1843, with force and arms at the parish aforesaid in the said county, 3000 pounds weight of copper ore of the value of 15*l.*, the property of *Joseph Lyle* and others, the adventurers in the said mine called *Carn Brea* mine, then and there being found, then and there feloniously did take and remove with intent then and there feloniously to defraud the said *Joseph Lyle* and others, the adventurers in the said mine, against the form of the statute, &c. and against the peace, &c.

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The prisoners were found guilty, and upon being brought up for sentence, *Slade*, for the prisoners, moved in arrest of judgment that the indictment was bad in not having sufficiently brought the offence within the statute. The statute enacts that if any person employed in or about any mine, in the county of *Cornwall*, shall take, &c. the ore of any metal, or any *lapis calaminaris*, &c. found or being in such mine with intent to defraud the proprietor of, or adventurer in, such mine, &c. or any workman engaged therein, then such person so offending, &c. Three principal matters are therefore necessary to constitute the offence. 1st. That the

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persons committing the offence should be persons employed in a mine in the county of *Cornwall*. 2d. That the removal or concealment should be of ore found or being in such mine. 3d. That such removal or concealment should be with intent to defraud the proprietor or proprietors, adventurer or adventurers, in such mine, &c. It is therefore necessary that each of these particulars of the offence should be proved, and equally necessary that they should be averred in the indictment. Now here there is no averment that the ore removed was in *the mine*; the words "then and there" refer to the *venue*, or at most to the parish and county mentioned in the body of the indictment, and would equally apply to a case of removal of the ore if it had been at the mouth of the mine and brought to the surface.

Rowe and *Merivale*, for the prosecution, contended that the words "then and there being found" might be taken to refer to the next preceding words or place, "in the mine," and cited *R. v. Wright*: (a) or that the averment of an intent to defraud the adventurers in the said mine, coming at the end of the allegations, the words "in the said mine" might be referred to all the allegations respectively. *R. v. Davies* and others. (b)

(a) 1 A. & E. 434.

(b) 10 B. & C. 89.

CRESSWELL J. ruled that the objection was valid, and the judgment was arrested.

See also *R. v. Roger Smith, ante*, p. 115.

Rowe and *Merivale* for the prosecution.
Slade for the prisoner.

1849.
REGINA
v.
TREVENNER
and
TRELEAGE.

REGINA v. ODGERS.

March 27.

THIS was an indictment for maliciously cutting and wounding with intent to do grievous bodily harm.

The prisoner, on being arraigned after the grand jury were discharged, had pleaded not guilty.

On the case being called on for trial,

Moody objected to the indictment, that its commencement was bad, being "the jurors of our Lady the Queen" instead of *for*. This had been ruled not to be a good objection in arrest of judgment, *R. v. Turner*, 2 M. & Rob. 214.; but the decision and reasons given in that case seemed to imply that at a previous step the objection would have been good, and he submitted that the prisoner's having pleaded ought not to deprive him of an advantage which his counsel, not being aware of it at the time of pleading, could not have taken before, and that he ought to be put in the same situation as if he had demurred and pleaded over, which

A prisoner cannot of right demur and plead over to an indictment for felony. A prisoner will not be allowed to withdraw his plea of not guilty, for the purpose of taking a mere technical objection. Where a party having a deadly weapon lawfully in his possession, in his own defence, but without having previously retreated as far as possible, cuts a person who is assaulting him, he is guilty of felony, under 1 Vict. c. 85. s. 4. if he intended grievous bodily harm.

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he might do in felonies. *R. v. Phelps*, 1 Car. & Mar. 181.; *R. v. Adams*, id. 299.; Archbold's Cr. Pl. 86. He therefore applied to the discretion of the Judge to allow the prisoner to withdraw his plea.

Rawlinson mentioned a case said to have recently occurred before Mr. Baron PARKE on the northern circuit, in which that learned Judge had refused to allow a plea to be withdrawn for the purpose of taking a mere formal objection.

CRESSWELL J. It is admitted that the only mode of the prisoner's taking advantage of the objection would be by demurrer; and it is said that in felonies he might demur and plead over at the same time. I am decidedly of opinion that the prisoner has no such right, and Mr. Justice PATTERSON and myself, after consultation on the *Oxford* circuit, agreed that it ought not to be allowed. If a prisoner demurs, he must abide the consequences. It is, however, clearly in the discretion of the Judge whether a prisoner should be allowed to withdraw his plea; and I think that for the purposes of substantial justice such withdrawal should be allowed, but not for a mere technical objection like this. In the proper exercise of this discretion I ought not to allow him to withdraw his plea in this case.

The facts of the case were that the prisoner, about ten o'clock on the night in question, had

fallen in with the prosecutor and his party, who were drinking at a public-house in *Bodmin* ; that the prisoner soon got into an altercation with the prosecutor, and challenged him or any two of his party to fight ; that he put down the blade of a scythe which he had just bought, and advanced towards the prosecutor to fight, but was prevented. Some time after, the prosecutor challenged the prisoner to fight, and one of his party standing by also challenged him, but they were again prevented fighting, and the prosecutor and his party left the house, but loitered near it, and the prosecutor sent back one of them to entice the prisoner out. The prisoner left the public-house in company with two other men whom he accidentally met with, and soon passed the prosecutor and his party. They had to go the same way home for about 400 yards, when the road diverged. The prosecutor and his party followed the prisoner to the diverging point, challenging him to fight, and using provoking language. At that point the prisoner took his own road, into which the prosecutor followed him and again challenged him to fight, which the prisoner refused, and said he would go back and take the peace of him, and actually went back a few steps towards *Bodmin* for that purpose ; but the prosecutor got before him and was making towards him, when the prisoner flourished his scythe, and told him to stand back or he would cut him down, and himself retreated a few steps. The prosecutor sprung on him and seized him by the collar ; a

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scuffle ensued, in which the prisoner struck the prosecutor across the shoulder-blade with the scythe and produced a severe wound, cutting the flat end of the bone in two.

It was contended for the prisoner that he had done nothing more than he had a right to do in self-defence; that having a deadly weapon lawfully in his hand, he had a right to use it against a person attacking him, especially after the warning he had given. The use of the scythe in self-defence was to some extent lawful; and the recent statute, 1 *Vict. c. 85.*, notwithstanding the omission of the proviso, "that in case death had ensued the offence must have amounted to murder," could never have been intended to make a party guilty of felony in using too much violence in his own defence against a clear wrong-doer.

CRESSWELL J. in summing up, said :—The law is perfectly clear. It is quite true that under the repealed statutes on this subject the facts must have been such that, if death had ensued, the offence would have amounted to murder. That, however, is not so now; and the recent act having omitted the proviso alluded to, the Judges have determined that the facts will bring a case within this statute, if the offence would have amounted to manslaughter in case death had ensued. (a)—If the

(a) *Anon. 2 Mood. C. C. 40.*

act was done unlawfully and maliciously, that is, without lawful excuse and intentionally, it is enough. Maliciously does not mean with premeditated malice, as in murder; an intention to do the mischief unlawfully will satisfy the statute. Now in order to render a case of homicide, committed with a deadly weapon, lawful on the ground of self-defence, it must appear that the party retreated as far as he possibly could, and then only used the weapon to avoid his own destruction. It is impossible to contend that the prisoner was so driven to use the scythe in this case; the offence would have amounted to manslaughter if death had ensued, though certainly not an aggravated one; and therefore you will be bound to say that the prisoner is guilty, if you believe he really intended to do grievous bodily harm.

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The facts were then commented on as to the intent, and the jury found the prisoner guilty of an assault; but of the felony,

Not guilty.

Rawlinson for the prosecution.

Moody for the prisoner.

CASES
ARGUED AND DECIDED
AT NISI PRIUS
IN THE COURTS OF
COMMON PLEAS AND EXCHEQUER,
AT THE SITTINGS AFTER
TRINITY TERM, 6 VICT.

COMMON PLEAS.

1843.

GUILDHALL,
July 3.

CHAPCOTT v. CURLEWIS.

An indorsee of a Bill of Exchange, ignorant of the drawer's address, and so unable to give him notice of the dishonor of the Bill, is bound to make enquiry for the address promptly on the Bill being dishonored, if he means to hold the drawer liable.

ASSUMPSIT by indorsee against drawer of bill of exchange, indorsed to one *Nicholson*, and by him to the plaintiff.

Plea: No notice of dishonour.

The bill became due on Saturday the 28th of *May*. The plaintiff living in *Hatton Garden*, and not knowing the address of the defendant, did not apply to *Nicholson*, who lived in *Bow Street Covent Garden*, until half past eleven, on Monday night, for the address of the defendant; *Nicholson* then

told him that the defendant was a tailor, in *Henrietta Street*, and the plaintiff sent a notice of the bill being dishonoured to him, on the Tuesday morning, which reached him in the course of the same day.

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Hoggins, for the defendant, submitted that the notice was too late.

Talfourd Serjt. The plaintiff was not bound to take any step on the Saturday when the bill fell due. On the Monday he could not give notice to the defendant, not knowing his address: notice at any time of that day would have been sufficient, had he been in a situation to give it; and it is reasonable that he should have the same time for making the enquiry as to the defendant's address, that he would have had for giving notice.

TINDAL C. J. I think the notice was too late; the plaintiff, if he meant to look to the defendant, and not to his own immediate indorser, ought to have made prompt efforts to ascertain where the defendant was to be found. Looking to the fact that all the parties reside in the same town, I think it was the duty of the plaintiff to have made his enquiries so as to admit of his giving the defendant notice on the Monday.

Nonsuit.

Talfourd Serjt. for the plaintiff.

Hoggins for the defendant.

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GUILDHALL,
July 4.

JEANS v. WHEEDON.

Where on a preliminary hearing of a case, the magistrate's clerk had taken down what a witness said, but neither witness nor magistrate signed it: held that what the witness said might be proved by any one who heard him, without producing the clerk's note.

CASE for a malicious prosecution.

The defendant had made a charge against the plaintiff before a magistrate, the hearing of which was, in the first instance, adjourned, and on a subsequent occasion the case was heard, and the depositions were gone through, taken down, and the plaintiff committed for trial. A magistrate's clerk attended on the first occasion and took down what the defendant said, but the defendant did not sign it, nor did the magistrate.

Bompas Serjt. objected that parol evidence was inadmissible of what the defendant said on the first occasion, and that the writing must be produced.

CRESSWELL J. I know from the depositions returned to me at the assizes, that, in practice when a case is adjourned, the depositions are not regularly reduced to writing under the statute; and I think that parol evidence is admissible here of what was said on the first occasion. If two persons are present on the examination of a witness, and one takes a note of what the witness says, and the other

does not, the latter is as competent as the former to prove what he heard.

Verdict for the plaintiff. (a)

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Talfourd, *Byles*, Serjts., and *Hance* for the plaintiff.

Bompas Serjt. and *Doane* for the defendant.

(a) See *Rex v. Harris*, 1 Mood. C. C. R. 338.

The fact of a conversation or transaction being reduced into writing, furnishes no general principle for excluding other evidence of the conversation or transaction than the writing. Such evidence is by no means necessarily secondary to the writing. Judges take notes of the evidence given on trials, yet the evidence may be proved from recollection, even on an indictment for perjury. (*Rowley's Case*, Moody's C. C. R. 111.) The exclusion must be founded either on the agreement of parties, or on the requirements of some particular law. When parties reduce into writing the terms of an agreement, or account of any other transaction, as between themselves such writing must be produced, and in the case of an agreement, cannot be contradicted, or even added to by parol evidence; for it is a reasonable presumption that, though other things were said or done besides those recorded in the writing, the parties concurred in treating those other things as not essential parts of the agreement or transaction. But this reasoning does not apply to third parties. There may well be occasions, either civil or criminal, in which others may have an interest in proving what really passed, and there is no reason why *they* should not be permitted to prove it, from the memory of witnesses, without producing the writing. Where matters are required to be reduced into writing by statute, either for the purpose of giving validity to the transaction, or for the purpose of evidence, the writing may be considered the primary evidence, and must be produced. But questions may, even in these cases, arise, as to the extent to which other evidence is to be excluded; in the determination of which, the necessity of the case in some in-

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stances, the purposes of the enactment in others, must be looked to. Thus, judicial records are not only primary, but from their nature conclusive, evidence of the decisions of courts of justice. The Statute of Frauds requires certain agreements, &c. to be in writing, to give them validity; and it may be laid down as a general rule, that in cases falling within that statute, the agreement cannot be added to, explained, or contradicted by parol. The statutes 1 & 2 Ph. & M. & 7 Geo. 4. c. 64. require the examinations of witnesses and prisoners to be reduced into writing, and parol evidence of what either of them said when under examination, cannot be received in the first instance on the criminal trial, preliminary to which the examination was taken. But even on such criminal trial, evidence is admissible by way of explanation, or to prove that the party made other statements besides those reduced into writing; otherwise, the safety of prisoners, and the credit of witnesses, would depend on the honesty and accuracy of the clerks who take the examinations; and instances (not occurring on such criminal trial) may perhaps arise, in which, what a witness said before a magistrate, might be given in evidence against him without even producing the written examination; at all events, it may be added to or explained, and that even by shewing other things said, pertinent to, and part of, the matters for which the examination was taken. (*Venafra v. Johnson*, 1 Moo. & R. 316.) In the principal case it was not, perhaps, necessary that the statements, parol evidence of which was objected to (viz., statements made by the defendant on the first occasion of his going before the magistrate), should have been reduced to writing at all; but even if the entire examination of the witnesses, and the committal of a prisoner, take place at the same time, it would seem most inconvenient as well as unreasonable to make the written examination conclusive, as to all the preliminary statements of the witnesses on which it is founded. In practice, the witnesses are allowed to tell their stories in their own way, and what the magistrates or their clerks consider to be the effect, is written down and then read over (it is true) to the examinant; but it is scarcely to be expected that he should be very exact in observing inaccuracies. To this it may be added, that matters may have been stated which were reasonably omitted from the written examination, in consequence of their appearing at the

time insignificant, though their connection with facts, subsequently brought to light, may have rendered them of the utmost importance.

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ADJOURNED SITTINGS IN THE EXCHEQUER.

SADLER and Others v. BELCHER and Others, GUILDHALL,
 Assignees of WHITMORE and Others. *July 3.*
Superior Court 9 Chy 27.

TROVER for a 500*l.* Bank of England note.

Plea 1. Not guilty.

2. That the plaintiffs were not possessed, &c.

The defendants were assignees of the estate and effects of Messrs. *Whitmore, Wells, and Co.* who on the 29th of *June*, A. D. 1841, and for many years previously, carried on business in *Lombard Street* in the city of *London*, as bankers. The plaintiffs on that day were, and for many years previously had been, customers of Messrs. *Whitmore, Wells, and Co.*, and on the said 29th *June* the plaintiffs had an account with Messrs. *Whitmore, Wells, and Co.* as their bankers, the balance of which account then was in favour of the plaintiffs, independently of the bank-note in question in this action. The course of business at the bank of Messrs. *Whitmore, Wells, and Co.*, was to close the business of the day at five o'clock, and then to make up their books and accounts of all


By the custom of a bank money paid in after banking hours, was put into a separate place of deposit, and entered in a counter-book, but not carried to the customer's account till next day : — where a customer paid in a bank note after the banking hours, and the banker having before resolved not to open his bank again, placed the note in such separate place of deposit, without carrying it to the account of the customer, and next

morning stopped payment, and became bankrupt, the bank note was held to remain the property of the customer.

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monies received or paid in the course of the day, before that hour. It was also their custom of business at five o'clock to draw in the counter-book a line under the last entry of monies received prior to that hour, during the day, and after that hour not to pay any cheques which might be presented ; but to receive any money which might be brought and deposit it in a separate place where it could not become mixed with the receipts of the day, and to enter the sums so received after five o'clock, together with the names of the persons on whose account they were paid in, in the counter-book under the line so drawn as aforesaid, but not to take into the account of the receipts of that day any money so received after five o'clock, nor to enter it in any other book than in the counter-book under the line as before stated, until the following day, when such money was entered in the books and taken into account as part of the receipts of such following day ; and when money was so paid in, the customer was entitled to draw upon it at the opening of the bank on the following morning. The counter-book was a book in which an entry was made of all monies paid in to the bankers as the same were paid in, and was always resorted to to ascertain whether money had been paid in by a customer during the day, before a cheque of such customer was dishonoured. The same course of business appeared to be pursued in the other *London* banks, varying only in the circumstance that in some *London* banks no entry is made in the counter-book of monies received after five

o'clock until the following day, but such monies are deposited in a separate place and marked with the name of the party on whose account they are paid in.

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Before five o'clock on the said 29th *June*, Messrs. *Whitmore, Wells*, and Co. had resolved to close their bank after five o'clock on that day, and not to open it again for business, and at five o'clock on the said 29th *June* a line was drawn in the counter-book, under the last entry of monies received during that day.

After five o'clock on the said 29th *June* the plaintiffs sent their clerk to Messrs. *Whitmore, Wells*, and Co.'s bank with the 500*l.* bank note in question, to be paid in to their credit. The bank note was received by a clerk of Messrs. *Whitmore, Wells*, and Co., and at the time he so received it he told the plaintiffs' clerk from whom he received it that it would not be taken into account that day. The bank note was then deposited by the clerk who received it in a separate place, where it could not become mixed with the monies which had been received before five o'clock on that day, and the amount of the said bank-note, together with the names of the plaintiffs, were entered, in the usual way, in the counter-book, under the line so drawn as aforesaid, but the bank-note was not ever entered in any other book belonging to Messrs. *Whitmore, Wells*, and Co., nor was it in any way (except in the manner before mentioned) carried to the account of the plaintiffs,

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nor was it entered in the plaintiffs' pass book, which was afterwards made up to the 30th of *June* 1841. Messrs. *Whitmore, Wells, and Co.* never opened their bank for business after the said 29th of *June*, and on the 30th of *June* 1841 they stopped payment, and committed an act of bankruptcy. At ten o'clock on the morning of the said 30th of *June*, the plaintiffs applied to have the bank-note in question returned to them, and were informed that the bankers would have returned it, but that they thought it had better wait until the official assignee was consulted. On the 1st of *July* 1841, a fiat in bankruptcy was issued against *Whitmore, Wells, and Co.*, and the defendants, as their assignees, took possession of the bank-note in question, and converted the same to their own use.

For the plaintiffs it was contended, that as the note had never been carried to their credit with the bank of Messrs. *Whitmore, Wells, and Co.*, at the time when the act of bankruptcy was committed, *Whitmore, Wells, and Co.*, would have been perfectly justified in returning it, and were bound to return it to the plaintiffs when it was demanded on the morning of the 30th of *June* : and *Thompson v. Giles (a)* and *Threlfal v. Giles* were cited, the latter of which was said to be almost precisely in point. It was an action for money had and received, brought against the assignees of *Warwick and Co.*, who were

(a) 2 B. & C. 422.

bankers in *Lancashire* ; and the facts were, that the plaintiff had, after banking hours, deposited a large sum of money with the manager of *Warwick* and Co.'s bank, at their place of business. The manager knowing that the bank was on the eve of stopping, although no resolution to that effect had been formally come to by the bankers, placed the money in a place by itself, separate from the funds of the house, and the bank never after that day opened for business. The action came on to be tried before the Lord Chief Justice ABBOTT at the *Lancaster* assizes, in the summer of 1822, and that learned Judge was of opinion that the plaintiff was entitled to recover. Here the case is stronger against the assignees, for a resolution to close their business had been come to by the bankers before the bank-note was paid in.

Upon its being distinctly proved by the plaintiffs' evidence, that the bank-note was paid in after five o'clock, and that *Whitmore Wells* and Co. had before then determined not to carry on their business after that day,

Lord ABINGER C. B. expressed a strong opinion that the plaintiffs were entitled to recover. His Lordship observed that the note had never been mixed with the assets of the house, nor had the amount ever been carried to the credit of the plaintiffs in the bankers' books ; and having been placed apart by the bankers, after they had come to a resolution not to open their bank again, it must be

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taken that they dealt with it as property held by them on behalf of the plaintiffs, unless some unlooked-for contingency should occur before the next morning which might enable them to alter their resolution. It was therefore like the case of *Atkins v. Barwick*. (a) There, a trader had bought goods of a creditor, but finding he was in failing circumstances, and could not pay for the goods, he put them aside in the hands of a third party, giving notice to the creditor that he had done so; and it was held that they did not pass to the assignees of the purchaser. And Lord MANSFIELD, in a subsequent case, remarked, that if the trader had, under such circumstances, kept the goods, it would have been a very dishonest act. (b)

Sir F. Pollock A. G., for the defendants, said he had been of counsel for the plaintiff in the case of *Threlfal v. Giles*, cited on the other side, and he did not think that after the intimation of his Lordship's opinion he should be justified in continuing the defence. He therefore submitted to a

Verdict for the plaintiffs.

Erle and *Fitzherbert* for the plaintiffs.

Sir F. Pollock A. G., and *Peacock* for the defendants.

(a) 1 Str. 165.

(b) See *Harman v. Fisher* 1 Cowp. 125.

SUMMER ASSIZES, 7 VICT.

DURHAM.

Coram CRESSWELL J.

The MASTER WARDENS and SOCIETY of
the Art and Mystery of APOTHECARIES of
the City of London, Plaintiffs, v. LOTINGA,
Defendant.

1843.

DURHAM,
July 31.

*A. G. v. Coll. of Physicians
1. Johns C. H. 561.*

THIS was an action of debt to recover penalties incurred by the defendant, under 55 G. 3. c. 194. s. 20., for practising as an apothecary, without having obtained a certificate as directed by the act.

A surgeon may administer medicines in the cure of a surgical case without being subject to the penalties of the *Apothecaries' Act* (55 G. 3. c. 194.), but he has no right to do so in the case of internal diseases not requiring surgical treatment, such as fever, or consumption.

The first count alleged that after the 1st day of *August*, 1815, mentioned in the act, to wit, on &c., the defendant (not being a person who on or before the said 1st day of *August* was actually practising as an apothecary) did act and practise as an apothecary in *England* (that is to say) by then and there, as such apothecary, attending and advising, and furnishing and supplying medicines to and for the use of one *Ann Pace*, without having obtained such certificate as by the said act is directed, contrary to the form of the statute, &c., whereby, &c. There was another count in the same form, only

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alleging one *John Palmerly* to have been the party advised and supplied with medicine; and five other counts in the same form, only varying the name of the parties; and there was a general count at the end, stating that the defendant acted and practised as an apothecary, by then and there, as such apothecary, attending and advising, and supplying and furnishing medicine *to and for the use of divers and very many persons* without having obtained such certificate as by the said act is directed, contrary, &c., whereby, &c.

Plea, *Not guilty*, by statute (21 Jac. 1. c. 4.)

It appeared that the defendant was a foreigner, who resided with a person represented to be his uncle, in the town of *Bishop Wearmouth*; and in regard to the first count, the evidence was that *Ann Pace* had been afflicted with a consumption for some months before *November 1842*, when the defendant was called in to attend her; he attended her till the *January* following, when she died; he was accustomed to desire the mother of the deceased to go to his house for the medicine, and upon her doing so the defendant gave some directions to his uncle in a language which the witness could not understand; the uncle then went into another room and brought some medicine in bottles, which the defendant examined, and smelt, and said it was all right, and put labels on the bottles, containing directions how the contents were to be used; and after the death of *Ann Pace* the mother received from the uncle a bill, in the

following form, which was partly engraved and partly in the defendant's handwriting:—

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“ Mr. *Pace* to Mr. *Lotinga*, Surgeon, &c.

	£	s.	d.
“ Bill delivered - - - -	-	-	-
“ Medicines, &c., from 1st <i>Nov.</i> 1842, to 2d <i>January</i> , 1843 - - -	-	-	-
	3	18	0
“ Journeys - - - -	-	-	-
“ Surgery - - - -	-	-	-
“ Fees - - - -	-	-	-
“ Account for Servants - - -	-	-	-
	3	18	0

“ Attendance

“ Particulars if required.”

In regard to the second count, it appeared that the defendant, at the request of a Mr. *Robson*, attended a boy, *John Palmerly*, for a complaint which he, the defendant, said was inflammation of the chest, and the defendant used to visit him at the house of the boy, and said he would send some medicines, which were in fact afterwards brought by his servant; amongst other things, he directed leeches to be applied, and sent some, for which the boy's father paid him 4s. He afterwards sent in a bill as follows: “ Mr. *Lotinga's* charge for medicine and attendance, from 5th of *March* till the 30th of *March*, 1843, on Mr. *Robson* for Mr. *Palmerly's* son, 1l. 17s.”

The plaintiffs' counsel then tendered evidence

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(on the last count) that the defendant in the month of *January* 1843, had attended one *Lancelot Appleby* for a paralytic affection; that the defendant supplied ten bottles of medicine, some to be used as embrocations, some to be taken internally; and that he sent in a bill charging 1*l.* 7*s.* for medicines, and 10*s.* 6*d.* for attendance.

Dundas, for the defendant, objected that this evidence could not be received; the case of *Appleby* was not referred to in any of the seven first counts, and the last count was too general; it would be a great hardship on the defendant if he were thus, without notice, suddenly required to explain the circumstances of any transaction which the plaintiffs might bring forward as a case of practising as an apothecary.

The learned Judge, however, ruled that the evidence was admissible; it was impossible to say that the evidence tendered did not tend to establish the facts charged in the eighth count; and if that count was open to any objection on the ground of its generality, an objection of that nature could not be urged in this stage of the proceedings.

The evidence was accordingly received.

Dundas then went to the jury upon the facts, and contended that the instances of practice relied upon by the plaintiffs were all cases in which the

defendant had practised not as an apothecary, but as a surgeon ; he had so described himself in his bills, and the cases themselves were properly of that kind. The first case proved (of consumption) was known to require surgical treatment, by bleeding, &c. ; and so was the second, in which, in fact, leeches had been applied ; and in the last instance, that of *Appleby*, the defendant (whether correctly or not) had treated the disease as one to be cured by external applications. He also contended that there was evidence that the defendant supplied the medicines rather as a chemist, than as an apothecary.

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CRESSWELL J. to the Jury. The sole question is, whether the defendant has practised as an apothecary, for it is not pretended that he had obtained any certificate authorizing him to do so. Now I apprehend that an apothecary is a person who professes to judge of internal disease by its symptoms, and applies himself to cure that disease by medicines ; and if you think the defendant has, in either of the cases proved before you, acted in that way, I recommend you to find your verdict for the plaintiffs. The mere fact of the defendant's having supplied medicines, does not necessarily show that he practised as an apothecary ; for a surgeon may lawfully do that, if the medicines are administered in the cure of a surgical case. If, for instance, in the case of a broken leg it becomes necessary to administer medicine, no doubt the surgeon may lawfully do so ; but on the other hand,

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if a surgeon takes upon himself to cure a fever, he steps out of his lawful province, and is not authorized to administer medicine in such a case. You then, on the whole, are to say whether, in the instances proved before you, the defendant acted as an apothecary, or as a surgeon. Take the case of *Ann Pace*. It is said that hers was a surgical case; but can a consumption fairly be so classed? how does the medical attendant judge of it? surely by the symptoms of the patient in regard to the internal functions of the body; and how does he apply himself to cure it? not by manual operation externally, but by the administration of medicine internally. Apply the same test to the other instances, and if in any of them you think that the defendant was acting as an apothecary, you must find your verdict accordingly. But then it is said, if he did not supply the medicines as a surgeon, still he did not supply them as an apothecary, but as a chemist. But a chemist is one who sells medicines which are asked for, whereas if you believe the evidence, the present defendant himself selected the medicines, and determined on which he ought to give.

Verdict for the plaintiffs on the first count, the plaintiffs not seeking to recover more than one penalty.

Wortley and Robinson for the plaintiffs.
Dundas and R. Ingham for the defendant.

See *Allison v. Haydon*, 4 Bing. 619.; *Apothecaries' Company v. Greenhough*, 1 Q. B. R. 799.

 CARLISLE.

1843.

BOWMAN v. BOWMAN.

CARLISLE,
August 10.

THIS was an issue *devisavit vel non*, directed by the Court of Chancery.

The will was attested by two witnesses. The plaintiff, who had to support the will, called one of the two witnesses, who deposed that in his judgment, the testator, at the time of executing the will, was of sound and disposing mind. He then called the other attesting witness, who said on his examination in chief, that he considered the testator was *not* of a disposing mind when he made the will; that he thought so at the time he attested the will, but was induced to attest it at the request of others.

The counsel for the plaintiff thereupon asked him whether he had not since the death said, in a particular company, that he thought the testator was competent to make a will.

Where on the trial of an issue *devisavit vel non*, from the Court of Chancery, the plaintiff, in obedience to the rule of that court, calls the second attesting witness, who gives evidence adverse to the plaintiff, the counsel of the plaintiff may put questions to him in the nature of a cross-examination.

Per me Long & Greenough
LR. 2. (29) 612.

Dundas, for the defendant, submitted that the plaintiff's counsel had no right thus to cross-examine his own witness, and he cited the *Queen's case*, 2 B. & B. 284.

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Watson, contra. He is not a witness called by the plaintiff, as a person for whose veracity he vouches. The present case coming out of Chancery, the plaintiff is, by the practice of that Court, compelled to call all the attesting witnesses to satisfy the conscience of the Lord Chancellor. In obedience to that rule the plaintiff has called the second attesting witness, and he proves to be an adverse one; but it never can be considered that by so doing the plaintiff is debarred from sifting his testimony by questions usually allowed in the case of adverse witnesses.

CRESSWELL J. I think a considerable latitude must be allowed in cases of this kind, the witness being rather the witness of the Court than of the party. I think the question may be put.

The question was accordingly put and answered.
Verdict for the plaintiff.

W. H. Watson, Greig, and Unthank for the plaintiff.

Dundas, Temple, and Ramshay for the defendant.

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LIVERPOOL.

Coram WIGHTMAN J.The QUEEN *v.* JOHN NEWTON.LIVERPOOL.
August 18.

THE grand jury having ignored a bill against the prisoner for bigamy,

Wilkins, on his behalf, suggesting that the prosecutors were about to prefer a fresh bill against the prisoner for the same offence, applied to the learned Judge for an order prohibiting the presentment of a second bill at these assizes for the same offence; and he cited *Regina v. Humphreys (a)*, where *Patteson J.* had expressed a strong opinion against the presentment of two bills for the same offence at the same assize; but

WIGHTMAN J. declined to make any order, saying he could not accede to the doctrine attributed to the learned Judge in the case cited.

The prosecutor preferred a fresh bill against the prisoner, which the grand jury found a true bill: the prisoner was now tried upon it for feloniously intermarrying with one *Elizabeth Kershaw*, on the 5th January, 1840, *Mary Newton* formerly called

Where the grand jury has ignored a bill of indictment, a second bill may be presented at the same assizes against the prisoner for the same offence. On a trial for bigamy, the prisoner's declaration, deliberately made, of a prior marriage in a foreign country, are sufficient evidence of such marriage, without proving it to have been celebrated according to the law of the country.
August 21.

(a) 1 Carr. & Marsh. 601.

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v.
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Mary Carlisle, his former wife, being then alive. It appeared that the prisoner returned from *America* four or five years ago, with the woman described in the indictment as *Mary Carlisle*, and that he lived with her as his wife for some years afterwards; that shortly after his return, he told her sister (who was called as a witness for the prosecution), that he had been married to *Mary Carlisle* at *New York*, by Dr. *Sinclair*, a presbyterian minister, and that Dr. *M'Laclan* was present. It appeared further, that he subsequently caused the bellman of *Oldham* to give public notice (which he did), that no one was to give credit to "*Mary*, the wife of *John Newton*." It was also proved, that some time afterwards, *Mary Newton*, describing herself as his wife, complained to a magistrate of his having ill-treated her; on which occasion the prisoner attended before the magistrate, and did not deny the alleged marriage, but said he could no longer live with her on account of her jealousy, and consented to allow her 8s. per week for her maintenance.

Wilkins submitted to the learned Judge that there was no sufficient evidence of the first marriage. The prosecutors were bound to prove the fact of the marriage in *New York*, and that it was solemnized according to the laws in force in *America* concerning marriage. Granting that the prisoner made the declarations spoken of by the witnesses, they are not sufficient evidence of the

first marriage. Thus an admission by a party that he has been discharged under the Insolvent Debtors' Act is not sufficient evidence of that fact; for, though discharged *de facto*, the law requires certain forms as necessary to the validity of such discharge, as to which the party cannot be supposed competent to speak *Scott v. Clarke*. (a) So here, the prosecutor should have proved what the law in *America* is, and have shown that the prisoner's first marriage was in conformity with that law: whereas no evidence was brought to inform the jury of the law of *America*, or to show that the mere solemnization of marriage by a presbyterian minister would amount to a valid marriage; and if the jury were at liberty to act on their own irregular knowledge on the subject, he suggested, that in that country marriage was a mere civil contract; and there was not any evidence at all of such a contract having been entered into by the prisoner and *Mary Carlisle*. He also referred to *Wilson v. Mitchell* (b), where it was held that a declaration by a female plaintiff that she was married, was not evidence in support of a plea of coverture.

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WIGHTMAN J. consulted CRESSWELL J., and in his summing up told the jury, that the question for them was, whether they were satisfied by the statements made by the prisoner on the various occasions referred to, that he had been married to

(a) 3 Campb. 226.

(b) Ibid 393.

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Mary Carlisle in *America*, and that such marriage was a valid one according to the law of that country. The jury were to say whether, as against the prisoner, it might not be taken, on the faith of his own repeated declarations, that the marriage had been a valid one according to the law in force at *New York*. If the jury were satisfied that it was, they should return a verdict of Guilty; and his Lordship pointed out to them that declarations hastily or lightly made were entitled to very little weight in such a case; but what the prisoner said deliberately, and when it was obviously his interest to deny his marriage, if he did not know it to be a valid one, was undoubtedly evidence entitled to the very serious consideration of the jury.

Not Guilty. (a)

Hulton for the prosecution.

Wilkins for the prisoner.

(a) See 1 Russell on Crimes (*Greaves'* edition), pp. 217, 218.

1843.

Coram CRESSWELL J.

SCHOLES v. CHADWICK.

LIVERPOOL,
Aug. 21.

THIS was an action on the case. The declaration alleged, that the plaintiff was possessed of a close, and by reason thereof was entitled to water his cattle at a pond in a field of the defendant's, which adjoined the plaintiff's also; that the defendant wrongfully drained off the water from the pond, and that in consequence thereof a mare of the plaintiff, in descending into the pond to drink, fell down a steep bank and was drowned.

On an issue, whether the plaintiff had an easement in the defendant's land, the declaration of a former occupier of the defendant's land is not admissible against him.

Plea 1. Not guilty.

2. Denying the right alleged.

Martin for the plaintiff, in proof of the right alleged, tendered evidence of a declaration made by a former occupier of the defendant's land. The wife of the occupier had requested him to fence off the pond, on account of its being dangerous to children; and *Martin* proposed to give in evidence the answer of the occupier, viz. that he could not fence it off, because the owner of the plaintiff's close had a right to water his cattle at it.

Murphy Serjt. objected to the evidence; the statement of a former occupier could not be ad-

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missible evidence against the reversioner. Before the Prescription Act, 2 & 3 W. 4. c. 71., even the acts of the occupier, if he had only an estate from year to year, did not bind the reversioner; *à fortiori*, it cannot be maintained that his mere declarations should have that effect.

Martin. The tenant is placed in possession by the reversioner, and represents the reversioner; and what he says in derogation of his own rights and interest at the time must be admissible evidence, though of course the weight due to it may be more or less.

CRESSWELL J. rejected the evidence.

Verdict for the defendant. (a)

Martin and *Pickering* for the plaintiff.

Murphy Serjt. for the defendant.

(a) See *Tickle v. Brown*, 4 Ad. & E. 378. (per *Patteson J.*) Before the statute, the acts of tenants might be evidence against the reversioners, yet their naked declarations were not so.

1843.

HOWARD *v.* NEWTON, MARSHALL, and BALL. *Aug. 26.*

TRESPASS for breaking and entering a dwelling-house. Second count for seizing and taking the plaintiff's goods.

Plea : general issue by statute.

The plaintiff having given evidence tending to connect the defendants *Newton* and *Marshall* with the seizure of the goods, as mentioned in the second count, and also evidence tending to connect the defendant *Ball* with breaking and entering the dwelling-house, as mentioned in the first count, but no evidence at all to bring home a joint trespass committed by all three defendants,

In an action of trespass against several defendants, the plaintiff having proved one trespass committed by some of the defendants, and another trespass committed by other defendants, is bound to elect, before the defendants open their case, against which defendants he will proceed.

CRESSWELL J., at the close of the plaintiff's case, asked *Wigham* (for the plaintiff) on which trespass he elected to go to the jury?

Wigham submitted that he ought not to be required to make his election until the defendant had closed his evidence. There was already evidence of both the trespasses complained of in the declaration, though he had failed to implicate all the defendants either in the one or the other tres-

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pass. This defect, however, might probably be supplied by the defendant's own evidence.

CRESSWELL J. I think you are bound to make your election now. The old authorities were, I think, in favour of the course for which you are now contending: but I had occasion some time ago to consider the point, and I found that of late a different practice has prevailed. It is so laid down by Mr. *Starkie* in his treatise on *Evidence* (a), and Lord *Kenyon* so ruled in a case (b) where a trespass was proved against two defendants, and the plaintiff afterwards attempted to prove a trespass in which all the defendants were implicated. As soon as the plaintiff has proved a distinct trespass committed by one of several defendants, and by him alone, and then tenders evidence of a different trespass, he is liable to be called upon to make his election.

Wigham thereupon elected to go for the trespasses proved against the defendant *Ball*, and the other defendants were acquitted. The case then proceeded as against *Ball* alone, for whom *Martin* called evidence.

Verdict for the defendants (c).

Wigham for plaintiff.

Martin for defendant.

(a) P. 1442.

(b) *Sedley v. Sunderland*, 3 Esp. 202.

(c) See *Tait v. Harris*, 1 Moo. & Rob. 282. *Hitchen v.*

Teale, 2 *ibid.* 30. *Roper v. Harper*, 5 Scott, 250. The practice of requiring a plaintiff to make his election against which of several defendants in trespass he will proceed, when his evidence discloses no joint trespass committed by all the defendants, but only separate trespasses by each, appears to proceed on the assumed rule that in a joint action against several trespassers, the plaintiff can only succeed against all by proof of a trespass in which all were implicated. (*Starkie on Evidence*, vol. iii. p. 1106.) Such has certainly been the rule of late years; but it is at least very questionable whether there really be any such rule, and the older authorities appear to warrant the position that in such a case the jury may find one of the defendants guilty of some of the trespasses, and the other defendants guilty of other trespasses, and may assess separate damages as against each. (See *Tidd's Pract.* p. 903. 7th edit., and the cases there cited). The distinction appears to be, that a plaintiff cannot in his declaration against several defendants allege several trespasses by each, but that, his declaration alleging only joint trespasses by all the defendants, the jury may assess damages separately against each, where the evidence on the trial shows several trespasses to have been committed by each defendant. This point came under the consideration of the Court of Common Pleas in *Easter* term, 1844, in a cause of *Elliott v. Allen and Others*, where, in an action of trespass against several defendants, *Shee* Serjt. moved for a new trial, on the part of some of the defendants, on the ground that the Lord Chief Justice had directed the jury that they could only find their verdict and give damages for such of the several acts of trespass complained of as all the defendants were shown to have been concerned in; but it became unnecessary for the Court to give any opinion on the point raised, because they thought that, even assuming such a direction to have been given and to have been incorrect, *Shee's* clients could have no ground of complaint, because the jury were thereby advised to measure the amount of damages by a scale which, according to the learned Serjeant's own argument, operated in favour of his clients. The Court, therefore, refused him a rule on that ground, though they granted a rule *nisi* to set aside the verdict, as being contrary to the evidence, and on the ground of excessive damages. However, supposing the jury to have the right of assessing several damages as against several defendants in the same action, it

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does not necessarily follow that a Judge may not properly put a plaintiff to his election against which of several defendants he will proceed, when it is clear on the evidence that he is unable to prove a joint trespass as against all; for it is, no doubt, extremely inconvenient to the administration of justice that a plaintiff should thus be permitted to combine in one inquiry several distinct and wholly unconnected acts of trespass, committed by different parties on different occasions, and it may be at different places, and in respect of wholly different property : — that a plaintiff has no absolute right to do this, seems to follow from the authorities, which lay it down that a declaration, which on the face of it thus alleges distinct trespasses to have been committed by several defendants, would be demurrable; and if the declaration be for joint trespasses, and the objection only appears on the evidence, a Judge may reasonably be supposed to have the power of putting the plaintiff to his election, on the same principle that a similar course is pursued on the trial of an indictment which charges distinct felonies. So, in an action of assault against only one defendant, where the declaration alleged only one assault, Lord *Ellenborough* after one assault had been clearly proved, would not permit the plaintiff to give evidence of another assault, for if he did, the jury might have to hear twenty different assaults proved, that the plaintiff might see which of them he would elect to go for. (*Stants v. Pritchett*, 1 Camp, 473.)

BODMIN.

Coram COLERIDGE J.

BODMIN,
 August 7.

REGINA v. ROBINS.

On a trial for rape, the prosecutrix having on cross-

THE prisoner was indicted for a rape on *Elizabeth Ann Robins*. examination denied that she had had connection with other men than the prisoner, those men may be called to contradict her.

The prosecutrix denied, on cross-examination by counsel for the prisoner, that she was acquainted, or had had connection, with several men who were named, and who were brought into court and shown to her at the time she was questioned. The counsel for the defence called these persons to prove that they were acquainted with her, and had had such connection.

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v.
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Greenwood for the prosecution objected to the evidence as inadmissible, and cited *R. v. Hodgson*, R. & R. 211.

Merewether and *Cornish*, for the defence, contended that it was admissible, as a material contradiction of the prosecutrix; and referred to *R. v. Barker*, 3 C. & P. 589., and *R. v. Martin*, 6 C. & P. 562.

COLERIDGE J. (after consulting ERSKINE J.) said that neither he nor that learned Judge had any doubt on the question. It is not immaterial to the question whether the prosecutrix has had this connection against her consent, to show that she has permitted other men to have connection with her, which on her cross-examination she has denied.

The witnesses were accordingly examined.

The prisoner was acquitted.

Greenwood for the prosecution.

Merewether and *Cornish* for the prisoner.

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BODMIN.

Coram COLERIDGE, C. J.BODMIN,
August 8.REGINA *v.* MORTON.

A constable telling a prisoner "any thing you can say in your defence we shall be ready to hear," renders a confession inadmissible.

THE prisoner was indicted for highway robbery.

The constable who apprehended the prisoner, said to him "what you are charged with is a very heavy offence, and you must be very careful in making any statement to me or any body else, that may tend to injure you; but any thing you can say in your defence we shall be ready to hear, or send to assist you."

It was proposed to give in evidence the statement made by the prisoner to the constable in consequence. This was objected to by *Moody* for the prisoner, and he cited *R. v. Drew*. (a)

The point was argued at length on both sides, and *Russell* on Crimes, p. 829, *Greaves'* edition, and the cases there cited, were referred to.

COLERIDGE J. said, upon reflection I adhere to my decision in the case of *R. v. Drew*. The true principle of the cases is a very simple one, that no-

(a) 8 Carr. & P. 140.

thing shall be said to make an impression on the prisoner's mind, tending to make him state a falsehood. I approve of the reasoning of the learned editor of *Russell* in his note on that case. If the latter words had stood alone, a confession obtained by them would be clearly inadmissible: they are likely to produce an improper effect on his mind. Before such evidence can be received, it must be seen that the prisoner's mind is free from any false hope or fear that would be likely to operate upon it, and induce him to state that which is not true. If any such influence has been used, both the hope and the fear must be removed by a proper caution, before the prisoner's statement can be received. In *Drew's* case the prisoner was told that what he said would be used for him. Is not that creating a hope, that if he told his story, whether true or false, it might benefit him? The caution that comes after does not take away the objection created by a promise in his favour; because it is impossible to say that the caution so modified the influence of the promise, as to leave his mind in an unprejudiced state, to tell only the truth. Besides, the law will not sanction this sort of balancing the one influence with another. The prisoner's mind must be left entirely free. Approving of the decision quoted, I think this case comes altogether within the principle of it. The word "defence" necessarily conveying to the prisoner's mind that what he said would be for his benefit, — the hope is created and remains. As to what has been

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said about the effect of this decision being to exclude every thing said before the magistrates, I altogether differ from it. It is the duty of a magistrate to give the prisoner the opportunity of saying what he chooses, whether for or against himself, provided no improper influence be used. But when a man interferes who has no such duty, and used language tending improperly to influence the prisoner's mind, the statement cannot be received.

Verdict, Not guilty.

Kinglake for the prosecution.

Moody for the prisoner.

CASES
 ARGUED AND DECIDED
AT NISI PRIUS
 IN THE COURTS OF
COMMON PLEAS AND EXCHEQUER
 AT THE SITTINGS AFTER
MICHAELMAS TERM, 7 VICT. 1843.

GUILDHALL.

*Pennell & Alwin
1. Male c 9. 250.*

PARIENTE v. PENNELL and Another, 1843.
Assignees of JUDAH DE PARIENTE, a **GUILDHALL,**
Bankrupt. Dec. 20.

*Capit. Maryonbanks
1. Dec. 466.*

THIS was a feigned issue directed to be tried by the Court, on an application made under the Interpleader Act; the question to be tried being whether certain furniture, which had been seized under a *fi. fa.* issued against the bankrupt at the suit of one *Herman Cusel* and *Reuben Goldzicher*, was, at the time of such seizure, the property of the plaintiff as against the said execution creditors, and as against the said assignees?

Goods suf- *Sittington*
 fered by the true owner to *James*
 remain in the *308*
 possession of a trader, till
 after a secret act of bank- *Capit. Maryonbanks*
 ruptcy, but *Reuben*
 taken posses- *1. Dec. 466.*
 sion of before the fiat, do
 not, since *2 & 3 Vict. c.*
 29., pass to the assignees.

The bankrupt had assigned the furniture by deed to the plaintiff on the 28th *April*, 1842, but re- *Graham & Alwin*
22. L. V. 119. R. C.
10. Dec. 61.

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mained in possession until the 9th *January*, 1843, when the plaintiff put a man in possession. On the 27th *January* the *fi. fa.* issued. On the 30th *January* a fiat in bankruptcy issued against *Judah de Pariente*, founded on an act of bankruptcy committed a few days before the plaintiff put the man into possession.

It was contended for the defendant that the goods being in the bankrupt's possession, as reputed owner, at the time when he became a bankrupt, they passed to his assignees under sect. 72. of the bankrupt act (6 *G. 4. c. 16.*).

For the plaintiff it was answered that, since the recent statute 2 & 3 *Vict. c. 29.*, the date to look to in these cases was the issuing of the fiat, and not the act of bankruptcy; and *Ramsey v. Eaton* (a) and *Ex parte Styan* (b) were relied upon as authorities to that effect.

TINDAL C. J. acceded to the decision in the last-mentioned case, and directed the Jury to find their verdict for the plaintiff if they believed that, at the time when he took possession of the goods, he had not notice of an act of bankruptcy having been committed by the bankrupt; if they

(a) 10 *Mee. & W. 22.*

(b) 1 *Turn. & Phill. 105.*

thought the plaintiff then had such notice, their verdict would be for the defendants.

Verdict for defendants.

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PARIENTE
v.
PENNELL.

Byles, Serjt., *Humfrey*, and *J. W. Smith* for the plaintiff.

Shee Serjt. and *James* for the defendants.

A rule was obtained in the following term calling on the defendant to show cause why the verdict should not be set aside and a new trial had, on the ground that the verdict was against evidence. The rule has since been discharged.

ADJOURNED SITTINGS IN THE EXCHEQUER.

BONFIELD v. GEORGE SMITH.

Mercer v. Whall.
30. Aug. 1843.
S. Ad. c. 200. 44.
1843.

INDEBITATUS ASSUMPSIT for goods sold and delivered, and on an account stated.

Plea in Abatement, that the promises in the declaration were made by the defendant and one *Walter Smith* jointly, and not by the defendant alone.

Issue thereon.

Upon *Martin* for the plaintiff rising to address the jury,

GUILDHALL,
Dec. 22.

Semble, on the trial of an issue of non-joinder of another defendant in an action for goods sold, the defendant is entitled to begin. He is so entitled if he admits the amount of the debt.

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BONFIELD
v.
SMITH.

R. V. Richards for the defendant submitted, that the only issue joined between the parties being, whether one *Walter Smith* was jointly liable with the defendant, and the affirmative of that issue lying on the defendant, he, and not the plaintiff, was entitled to begin.

Martin contra. The plaintiff is under the necessity of producing evidence to show what the amount of the debt is; for if he do not, he can only recover nominal damages: and he referred to *Morris v. Lotan.* (a)

ALDERSON B. The declaration is in general terms, and if no particular had been annexed to it, it might have been necessary for the plaintiff to show what the debt in dispute is. But the plaintiff has, in pursuance of the practice now established, delivered particulars distinctly pointing out for what parcels of goods he is going, and at what prices, and when they were delivered. The defendant then by his plea admits the delivery, subject to this, that he contends that *Walter Smith* was a joint purchaser with him of the whole, or at all events of some part, of those specific goods; and if he fails to show that, the verdict must clearly be against him for nominal damages, and perhaps for the price of all the goods in the particulars, or at any rate

(a) 1 Moo. & Rob. 233.

for all that the plaintiff can show to have been delivered. The test I have been accustomed to apply in these cases is, whether, if no evidence at all be given, the plaintiff or the defendant would be entitled to a verdict? If I apply that test, it is clear that the defendant ought to begin. Lord DENMAN appears to have taken a different view of the question in the case quoted: But if the defendant's counsel will admit that, unless he establishes his plea, the plaintiff is entitled to a verdict for the amount of all the goods mentioned in the particulars, it will remove all doubt in my mind, and the defendant will clearly be entitled to begin.

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 BONFIELD
 v.
 SMITH.

Richards then said, that he was ready to admit the delivery and price of the goods, as stated in the particulars, if the learned Judge thought he was bound to do so; and Mr. Baron ALDERSON assenting to this, the learned counsel for the defendant thereupon made the admission, and addressed the Jury; and on his referring, in the course of his address, to his offer to admit the delivery of the goods, ALDERSON B. said that, on consideration, he doubted much whether he ought to have required from the defendant's counsel that admission. He thought that the correct practice, on such a plea as this, would be for the defendant, in the first instance, to prove the joint liability of the alleged co-contractor as to all the goods stated in the particulars: and that if he failed to do so, the plaintiff should have a verdict either for nominal

1843.
 BOSFIELD
 v.
 SMITH.

damages, or for the value of such goods, specified in the particulars, as he might prove to have been delivered to the defendant, and as to which the defendant failed to establish the joint liability set up by the plea in abatement.

Verdict for the defendant.

Martin for the plaintiff.

R. V. Richards for the defendant.

On this case being moved in the following term, the Court approved the decision that, under the circumstances, the learned Baron had made, and all the learned Barons were of opinion that at all events the defendant, admitting the particulars, was entitled to begin.

WINTER ASSIZES, 7 VICT.

YORK.

Coram MAULE J.

1843.
 YORK,
 Dec. 24.

THE QUEEN v. BUTTERFIELD.

In setting out a judgment for felony, it is not sufficient to allege that at the sessions of gaol delivery &c. "it was presented" &c. without saying by whom, and on oath &c.

THE prisoner was indicted as an accessory after the fact to a robbery committed by a man named *Burke*.

The prisoner having been convicted,

Bliss moved in arrest of judgment, on the ground that the caption of the former indictment was not sufficiently set out in the present one, which was in the following form: "The Jurors for our Lady the Queen upon their oath present that heretofore, to wit, at the general sessions of gaol delivery of, &c. holden, &c. *it was presented* that one *John Burke*" (reciting the indictment to the end), "upon which said indictment the said *John Burke* at the sessions of gaol delivery aforesaid was duly convicted of the felony and larceny aforesaid, as by the record," &c.; he contended that the present indictment ought to have alleged by whom, and on whose oaths, the former indictment was presented. It might have been a presentment by two justices, in which case it would have been an improper trial.

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v.
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FIELD.

Wilkins and *Pickering* *contrà*. The nature of the court before which the trial was had is properly described, and it must be presumed, especially after verdict, that the presentment was proper, and the trial properly had: besides, the indictment avers that *Burke* was then and there "duly convicted," and the Jury have now found that to be true, which could not be unless there had been a proper trial. It will, at least, amount to an averment that *Burke* had committed a felony, which is all that is necessary to support the charge against the accessory.

value &c., and 128 pounds weight of leather of the value &c., of and belonging to the said *Edward Stead* and others his masters as aforesaid, then and there being found, then and there feloniously did steal, take, and carry away, against the form &c., and against the peace &c.

1843.
REGINA
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HINLEY.

In a second count *George Hinley* the elder was charged with receiving the said goods knowing them to be so stolen.

In another count *George Hinley* the elder was indicted for receiving the goods before then stolen by an ill-disposed person to the Jurors unknown, the said *George Hinley* knowing them to be stolen.

The larceny and receiving were throughout the indictment stated to have taken place in *Yorkshire*.

The prisoners were son and father : in the beginning of *March* 1843, and from thence till the 10th of *November* following, the son was in the employment of the prosecutors, who were curriers and wholesale dealers in boots and shoes. The two prisoners lived together at *Kirkstall*, a village within two miles of *Leeds*, up to the end of *April*, when the elder prisoner removed to *Preston* in *Lancashire*. It appeared that when he so removed, he took with him a hamper, which passed and repassed afterwards repeatedly between the father and the son, backwards and forwards, down to *October*. On the 10th of *November*, the lodgings of the younger prisoner at *Kirkstall* were searched, when a quantity of shoes and leather were

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v.
HINLEY.

found there, belonging to the prosecutors: and at the same time and place were also found sundry letters from the father to the son, the contents of which induced the prosecutors to search the shop of the elder prisoner, who was then carrying on business as a shoemaker at *Preston*, and in that shop there was also found property of the prosecutor's, consisting of boots, shoes, and leather, of the value of about 150*l.*; and letters from the son to the father were also found there. The counsel for the prosecution proposed to put in the letters both from the father to the son, and from the son to the father, and he stated that those letters were dated at various periods, between *May* 1843 and the month of *October* following, and that they would be found to refer to the transmission from the son to the father of goods of the nature of those found at the father's house.

Bliss, for *Hinley* the elder. These letters cannot be read, or at any rate, not all of them. If they refer continually, as suggested on the part of the prosecution, to the transmission of the property, the effect of giving them in evidence will be to assist the proof of a single felony by proof of other felonies. The prosecutors must elect on which offence they will proceed, and give in evidence such matter only as relates to that felony. A prisoner ought not to be so embarrassed in his defence.

T. F. Ellis for the prosecution. It does not appear that there has been more than one taking and

one receiving. It is indeed very probable that the property was taken and received at different times, but the probability is not sufficient to put the prosecutors to their election. The rule applies only where there is distinct proof that the matters charged constitute technically separate offences; *Rex v. Dunn* (a). Then, even if the prosecutors were confined to a single offence, committed, for instance, in *October*, the letters are all evidence against the elder *Hinley*, as showing his guilty knowledge on that occasion, by proof of repeated acts of receiving by him, antecedent to the offence to which the indictment refers, under circumstances which must have shewn him that the property was not honestly obtained.

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 v.
 HINLEY.

MAULE J. There is no rule of law that more than one felony may not be charged in a single indictment: if there were such a rule, the great majority of indictments would be bad on error. It is true that Judges are in the habit of not allowing several felonious acts to be given in evidence under one indictment, where, as will often be the case, the effect of so doing will be to create confusion, or to surprize the prisoner, or otherwise embarrass the defence. But here embarrassment and injustice would be produced by putting the prosecutors to their election. They cannot possibly know at what time the several larcenies and receivings (if

(a) 1 Moody's C. C. R. 146.

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HINLEY.

more than one) took place ; the whole, according to the opening, seems to constitute a continuous transaction ; therefore I shall admit evidence relating to any takings and receivings, under the circumstances suggested, provided the indictment contains corresponding charges.

Bliss then objected that there was no proof of a receiving in *Yorkshire* ; and if the stat. 7 & 8 G. 4. c. 29. s. 56. is relied upon, as authorising the trial in *Yorkshire*, there is still a variance, because the receiving is laid in *Yorkshire* but proved in *Lancashire*. The indictment should have charged the receiving in *Lancashire*, and then have introduced proper averments to shew that the section applied. Thus, in *R. v. Mellor (a)*, it was held to be a fatal defect that an offence committed in the town of *Nottingham* was laid as committed in the county of *Nottingham*, although by stat. 38 G. 3. c. 52. s. 2., offences committed in a town corporate (which *Nottingham* was shewn to be) may be tried in the adjoining county.

Ellis. There the statute merely authorizes the trial in the adjoining county : the words in stat. 7 & 8 G. 4. c. 29. s. 56., are that the receiver “may be *dealt with*, indicted, tried, and punished” in any county or place in which the party guilty of the principal felony or misdemeanor may be tried *in*

(a) Russ. & Ry. C. C. R. 144.

the same manner as such receiver may be dealt with, indicted, tried, and punished in the county or place where he actually received such property.

1843.
REGINA
v.
HINLEY.

Bliss. The words relied upon make no difference. The stat. 9 G. 4. c. 31. s. 22., as to bigamy, enacts that the "offence may be *dealt with*, inquired of, tried, determined, and punished in the county where the offender shall be apprehended or be in custody, as if the offence had been actually committed in that county." Yet in *R. v. Fraser (a)* where the offence was committed in *Surrey*, and the prisoner apprehended in *Middlesex* and tried by a *Middlesex* Jury, the conviction was held bad, because the indictment did not aver where the prisoner was apprehended.

Ellis contra. In *R. v. Mellor*, the indictment was not made good by stat. 38 G. 3. c. 52. s. 2., because though that statute gives jurisdiction to the Grand Jury for the county over offences committed in the corporate town, it left the proceedings otherwise unaltered; it was therefore improper to describe the offence as committed where it was not committed. Here the receiver, by stat. 7 & 8 G. 4. c. 29. s. 56., is to be dealt with, &c. as he would have been dealt with, &c. in *Lancashire*. Now, in *Lancashire* he would have been charged with committing the offence in the county in

(a) 1 Moody's C. C. 407.

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which he was tried : he must be so charged here to satisfy the statute : that is, he must be charged as committing it in *Yorkshire*. In *R. v. Fraser* the judgment was arrested. The objection must therefore have been on the record : and probably the fault was that the indictment laid the offence to be committed in *Surrey*, and contained no additional averment as to place. Here there is no objection on the record, both offences being laid to have been committed in *Yorkshire*. Besides, by stat. 7 G. 4. c. 64. s. 20., the judgment cannot be stayed or reversed "for want of a proper or perfect venue."

MAULE J. I think the objection fails. No inference can be drawn from the decision on the stat. 38 G. 3. c. 52. s. 2., which merely gave jurisdiction over offences committed in certain places, but did not otherwise alter the method of dealing with the offence. The language of 7 & 8 G. 4. c. 29. s. 56., is very much more extensive, and appears to me to justify this method of indictment, unless *R. v. Fraser* be an authority against it. The words of the stat. 9 G. 4. c. 31. s. 22., upon which that case was decided, certainly resemble those of stat. 7 & 8 G. 4. c. 29. s. 56., so far as regards this question. But, upon looking at that case, I find that the judgment was arrested, which certainly would not have been done except for a defect on the record. No doubt that defect must have been that the offence was charged to have

been committed in a county different from that in which the trial was had, without any explanatory averments. That would be a good ground for arresting the judgment: but here no defect appears on the record. (a)

Both prisoners were found guilty.

T. F. Ellis, and *J. H. Hill*, for the prosecution.
Bliss for *George Hinley* the elder.
Wilkins for *George Hinley* the younger.

(a) *R. v. Whiley*, 2 Moody, C. C. 187.

Coram COLTMAN J.

REGINA v. DILWORTH and SMITH.

THE indictment charged that the prisoners on &c. at &c. unlawfully, maliciously, and feloniously did administer to and cause to be taken by one *Margaret Leach*, a large quantity, to wit, half an ounce of a certain deadly poison called opium (well knowing the said opium to be a deadly poison) with intent to commit murder, against the peace, &c. and contrary to the form of the statute, &c.

Second count described the substance administered to be "a certain destructive thing to the Jurors unknown."

The prosecutrix had, on the 18th *September*, been left in charge of her master's house (in a lone situation on the borders of *Yorkshire* and *Lanca-*

1843.

REGINA
 v.
 HINLEY.

1843.

On an indictment under 1 *Vict. c. 85.* for feloniously administering poison, the prisoner cannot be convicted of an assault under the 11th s. of the statute.

1848-
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v.
DILWORTH.

shire), and having occasion to go out into the yard of the house about ten o'clock at night, observed the two prisoners, who immediately threw her down, and said they would kill her if she did not swallow some stuff out of a phial which they held to her mouth, and which stuff the evidence tended to prove was a preparation of opium. She struggled, but was compelled to swallow it; they then tied her apron tight over her face, and round her neck, and left her lying on her back in the yard. She became weak, but crawled across a few fields towards a neighbour's house, which she had not, however, strength to reach, and was eventually found, about one o'clock in the morning, lying in a field between the two houses, — almost insensible, and very ill. Medical aid was obtained, and, by proper treatment, she recovered in a few days; but there was reason to conclude from the evidence of the medical witness, that had she remained much longer undiscovered, her life would have been in very great peril. Her master returned about eleven o'clock at night, and found his house robbed.

Pashley, for the prosecution, stated, it was probable the prisoners did not positively intend to cause the death of the prosecutrix, but only to stupify her, so that they might have an opportunity of carrying off plunder from the house in which she lived. But if their main intent was to steal from the house, and in order to effect that, they committed an act in itself unlawful, they must be taken

to have intended all consequences likely to result from such act, and death was one of those consequences: it was immaterial which was the principal and which the subordinate intent. *Rex v. Gillow (a)*, In *Rex v. Jones (b)*., *Patteson J.* expressed himself in the following terms: —

“ It is a very important question, whether, on a count charging an intent to murder, it is essential that a jury should be satisfied that that intent existed in the mind of the prisoner at the time of the offence, or whether it is sufficient that it would have been a case of murder if death had ensued; however, if it be necessary that a jury should be satisfied of the intent, I have no doubt that the circumstance that it would have been a case of murder if death had ensued, would be of itself a good ground from which the jury might infer the intent, as every one must be taken to intend the necessary consequences of his own acts.” In this case death did not ensue, and was therefore no necessary consequence; but it will be shown, that although the effects of opium vary greatly in different cases, still it was likely that if a person forced to take such a dose as was swallowed by the prosecutrix had remained all night in the fields, death would have ensued; the circumstance of the

1843.
REGINA
v.
DILWORTH.

(a) 1 Moody's C. C. 85.

(b) 9 C. & P. 258.

1843.

 REGINA
 v.
 DILWORTH.

prosecutrix having been providentially rescued from her danger by a passer-by, could not alter the character of the prisoners' act. He also submitted, that if the facts did not sufficiently establish the intent to murder, still the administering poison under these circumstances, in itself, included an assault, so as to enable the jury, under the *stat. 1 Vict. c. 85.*, to find the prisoners guilty of a common assault. In *Reg. v. Button (a)*, the mixing a deleterious drug with coffee, and procuring the mixture to be taken, was held to amount to an assault on the person taking it: if that case be law, this indictment includes an assault, and on the evidence it is clear that, in point of fact, an assault of a forcible nature was committed.

COLTMAN J. I do not agree with the decision in *Reg. v. Button*, and am of opinion that, on this indictment, the prisoners must either be found guilty of the whole charge or acquitted. *(b)*

(a) 8 Carr. & P. 660.

(b) It would seem difficult to predicate of the offence laid in this indictment (administering poison with intent to murder), whether it does or does not necessarily include the commission of an assault against the person, so as to render the party liable to be convicted, under the statute *1 Vict. c. 85.*, of that minor offence. It would seem to depend upon the means used, and the form of the indictment. If, for example, in the present case, the indictment had charged (as it might have done) *that the prisoners threw the prosecutrix on the ground, and by hold-*

COLTMAN J., in summing up, told the jury:—

It would undoubtedly appear probable that one intention of the prisoner was to rob the house; but they may have had that intention and also another, namely, to destroy life; and if a noxious drug is administered which is likely to occasion death, and the party administering it is indifferent whether it occasion death or not, that party must be looked upon as contemplating the probable results of his own action.

The prisoners were both found guilty, and judgment of death was recorded.

Pashley and Overend for the prosecution.

The prisoners were undefended.

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REGINA
v.
DILWORTH.

ing her hands, and placing the bottle to her lips, compelled her to swallow the poison, and so administered it, it would seem difficult to say that such a charge, so laid, would not include the commission of a common assault; but for any thing that appeared on the face of the indictment in this instance, the poison might have been administered without any assault, or any application of force; nay, even without any threat of force. The 11th section of the stat. (1 Vict. c. 85.) enacts, "That on the trial of any person for any of the offences hereinbefore mentioned" (of which the administering poison with intent, &c., is one), "or for any felony whatever where *the crime charged shall include an assault against the person*, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, *if the evidence shall warrant such finding.*" But, notwithstanding these latter words, it seems that the more reasonable construction of the act would require that the power to convict of the common assault should be confined to cases where the nature of the felony in itself necessarily includes an assault; or where the felony, *as charged in the indictment*, in fact does include an assault. See *Watkins' case*, 2 Moody, C. C. 218. *Phelp's case*, ib. 240.

SITTINGS IN THE COURT OF EXCHEQUER, IN
MICHAELMAS TERM, 1843.

Coram ALDERSON, B.

1843.

WESTMINSTER,
Nov. 2.

YOUNG *v.* HONNER.

On an issue as to the genuineness of a signature, if a witness denies the genuineness, and assigns as his reason, a peculiarity in such signature, other documents, exhibiting the same peculiarity, may be put into his hands on cross-examination, and the witness may be questioned upon them, for the purpose of testing the value of his evidence as to the genuineness of the disputed signature. If he denies the documents to be genuine, proof is inadmissible of that fact.

ASSUMPSIT against the acceptor of a bill of exchange.

Plea. That the defendant did not accept the bill, and issue thereon.

The only question in the cause was, whether the words "accepted, *Robert Honner*," appearing on the bill as an acceptance, were the genuine handwriting of the defendant.

A witness called for the defendant swore he believed the signature not to be the genuine signature of the defendant; and as a reason for that belief he added, that the defendant always signed his name thus—" *R. W. Honner*."

Upon this *Lee*, for the plaintiff, in cross-examining the witness, put into his hands a document purporting to be signed "*Robert Honner*," and asked him whether he believed it to be the

genuine signature of the defendant : and on his answering in the affirmative, he was asked whether the document was not signed "*Robert Honner?*" and whether, after seeing that document, he would persevere in saying that the defendant always signed his name "*R. W. Honner?*" The document was not in any way relevant to the present issue.

1843.
YOUNG
v.
HONNER.

Thesiger objected that this course of cross-examination was not allowable, and insisted that it was merely instituting a comparison of hand-writing ; he cited *Doe v. Suckermore* (a), and *Griffiths v. Ivory* (b).

ALDERSON B. (after consulting the other Barons, who were sitting *in banco*) said the Court was unanimously of opinion that the cross-examination, as far as it had been pursued, was regular, and that the question objected to might be properly put. His Lordship added, that they could not subscribe to the decision of the Court of Queen's Bench in *Griffiths v. Ivory* ; but the inconvenience there suggested, viz. that the Jury would have to try various collateral issues, did not arise here, for the witness had himself admitted the document now put into his hands to be genuine ; and surely, if the peculiarity existed in it which he relied upon,

(a) 5 A. & E. 703.

(b) 3 P. & D. 17.

1843.
YOUNG
v.
HONNER.

as disproving the genuineness of the signature now in dispute, that must be a circumstance by which to test the value of his belief on the subject. But if the witness had denied the genuineness of the signature to the document now put into his hands, he should not have allowed any issue to be raised upon that point.

The question was accordingly put.

Verdict for the plaintiff.

Humfrey and R. V. Lee for the plaintiff.

Thesiger, Butt, and Clarkson for the defendant.

CASES
ARGUED AND DECIDED
AT NISI PRIUS

IN THE COURTS OF
COMMON PLEAS, AND EXCHEQUER,
AT THE SITTINGS IN AND AFTER
HILARY TERM, 7 VICT.

SITTINGS IN TERM.

EXCHEQUER.

SAMUEL EVELEIGH v. PURSSORD.

1844.
WESTMINSTER,
Jan. 27.

THIS was an issue directed by the Court of Exchequer to try whether certain goods seized by the Sheriff, in *November* 1843, under an execution against *William Eveleigh*, were at the time of such seizure the goods of the plaintiff, *Samuel Eveleigh*.

The plaintiff, who was a relation of *William Eveleigh*, claimed under a bill of sale bearing date in *January*, 1843, by which it was alleged that the goods in question, principally household furniture, were conveyed to him by *William Eveleigh*

A bill of sale of goods executed by a debtor to his creditor is not void, by reason of preference given over other creditors. If intended by the parties really to operate and to give the creditor the power of taking possession, it is good although not acted on by taking possession.

1844.
EVELEIGH
v.
PURSORD,

as a security for money previously advanced. It was provided by a clause in the bill of sale that the plaintiff was to be at liberty to enter and take possession of the goods, if the principal and interest were not paid on a certain day in *July* 1843. There was evidence of money actually advanced by the plaintiff to *William Eveleigh* in *March* 1841, and no proof that it had been ever repaid to the plaintiff. *William Eveleigh* remained in possession at the time of the seizure by the sheriff. The execution of the bill of sale by *William Eveleigh* was admitted under a judge's order. There was no evidence of any action pending against *William Eveleigh* at the time of the date of the bill of sale.

For the defendant it was contended that the bill of sale was fraudulent and void ; and that it was a mere contrivance to protect *William Eveleigh*, who was then in difficulties, from executions expected to be issued by his creditors ; and in support of that argument the following facts were relied upon : viz., the difficulties in which *William Eveleigh* was placed at the time he executed the bill of sale ; the retention of possession by him down to the time of the seizure ; the nonproduction of the attesting witness ; the fact that the instrument was prepared by *William Eveleigh's* attorney, and that it was not stamped until a few days before the present trial ; and the cases collected in 1 *Smith's*

Leading Cases, p. 10, 11, 12., were cited and commented upon.

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 EVELLIGH
 v.
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For the plaintiff, *Thesiger* submitted that these were only circumstances from which, if unexplained, a jury might draw the inference, if they pleased, that the bill of sale was not a *bond fide* instrument of conveyance; that the agreement to admit the execution of the bill of sale relieved the plaintiff from any presumption that his not calling the attesting witness might otherwise have raised against him; and that the conveyance being only intended as a security, and redeemable on payment of the principal money and interest, the grantor's retaining possession, even beyond the day of default, was quite consistent with the ordinary *bond fide* transactions of life; and he cited *Martindale v. Booth*. (a)

ROLFE B., in summing up, told the jury that the question which they had to determine was, whether the goods, by the operation of the bill of sale, had really become the property of the plaintiff, or whether that instrument was fraudulent and void; that the difficulty of solving that question arose, in a great measure, from the equivocal sense in which the term "fraudulent" was used on these occasions. In one sense, it may be considered fraudulent for a man to prefer one of his

(a) 3 B. & Adol. 498.

1844.
EVELEIGH
v.
PURSSORD.

creditors to the rest, and give him a security which left his other creditors unprovided for ; but that is not the sense in which (except in cases of bankruptcy) the law understands the term "fraudulent." The law leaves it open to a debtor to make his own arrangements with his several creditors, and to pay them in such order as he thinks proper. What is meant by an instrument of this kind being fraudulent is, that the parties never intended it to have operation as a real instrument, according to its apparent character and effect.

His Lordship then commented on the facts of the case, pointing out the different circumstances which, in themselves, tended to raise an inference against the plaintiff. His Lordship said that, as to the principal fact relied upon, viz. the non-delivery of possession, he believed the modern and more approved doctrine of the Court, was, that it was a fact calling for explanation, and from which, if unexplained, a jury *might* be led to infer that the instrument was not meant to operate. Still, it was only a circumstance requiring explanation, and certainly less open to suspicion where, as in this case, the conveyance was only by way of mortgage. Undoubtedly the transaction was not so satisfactorily cleared up as it might have been ; the attesting witness might have been called, not to prove the execution of the instrument (which was admitted), but to prove what took place at the time, and more especially to prove who kept possession of the bill of sale after its execution ; for

that was not explained ; and if the grantor kept it (as had been insinuated by the defendant) it would have been an important fact against the plaintiff ; again, the absence of any evidence of pressure by the plaintiff was another circumstance which was fit to be urged upon the jury, as raising some inference against the *bona fides* of the transaction. But notwithstanding these circumstances, the question for the jury to determine was, whether, on the whole, they were satisfied that the bill of sale was intended to have operation in favour of the plaintiff, and to confer upon him a right, to be exercised at his pleasure, over the property ; if so, they ought to find for the plaintiff. If, on the other hand, they thought the transaction was a mere sham, executed colourably, and only for the purpose of protecting *William Eveleigh* against creditors, and without its being really meant to transfer the goods to the plaintiff, then they ought to find a verdict for the defendant.

Verdict for the plaintiff.

Thesiger and *Ogle* for the plaintiff.

Erle and *Hoggins* for defendant.

1844.
EVELEIGH
v.
PURBORD.

ADJOURNED SITTINGS AFTER HILARY TERM
IN THE
COMMON PLEAS.

1844.

WESTMINSTER,
Feb. 15.

A plea of *non cepit* in replevin does not put the plaintiff to proof of property.

DOVER v. RAWLINGS.

REPLEVIN.

Plea. *Non cepit*, and issue thereon.

The plaintiff proved a seizure of the goods by the defendant, but failed in proving any property in them, or that at the time of the seizure they were in his (the plaintiff's) possession.

Channell Serjt. objected that upon the issue joined, it was necessary for the plaintiff to shew himself in possession of the goods. The new rules had introduced no alteration in the pleadings in replevin, and before those rules *non cepit* put the property in issue.

TINDAL C. J. I agree that the new rules do not apply to this form of action; but I find that in *Comyns' Digest* a plea is given expressly denying the property, and I think that the plea of *non cepit* would not, according to the old course of

pleading, put the plaintiff on proof of the possession. (a)

The plaintiff accordingly had a verdict.

1844.
DOVER
v.
RAWLINGS.

Bompas Serjt., and *Hugh Hill* for the plaintiff.
Channell Serjt. and *Rodwell* for the defendant.

SPRING ASSIZES, 7 VICT.

YORK.

Coram ROLFE B.

REGINA v. JOSEPH CHADWICK.

YORK,
March 19.

INDICTMENT for forging a receipt, purporting to be a receipt for 12*l.*, in discharge of a debt and costs in an action pending in an inferior court, with intent to defraud *John Crowther*. In another count the forgery was alleged to have been committed with intent to defraud *Joseph Allatt* and *George Goodall*; and there were various other counts alleging the intent differently.

It is not forgery fraudulently to procure a party's signature to a document, the contents of which have been altered without his knowledge.

The prisoner was an attorney, and had been employed by *Crowther*, who was indebted to a building club, to settle an action of debt brought, at the suit of the club, against him as surety for one *Charlesworth*. A meeting accordingly took place, at which *Allatt*, the treasurer, and *Goodall*,

(a) See Com. Dig. Pleader, 3 K. 11.

1844.
REGINA
v.
CHADWICK.

a steward of the club, and several others, attended ; and ultimately the club agreed to take 9*l.* in satisfaction of their demand. The prisoner then produced a piece of paper, on which was a stamp, and a receipt was drawn up and written upon it, and handed to *Allatt*, who read it aloud, and returned it to the prisoner ; and shortly afterwards it was returned to *Allatt*, and he and *Goodall* signed it, the prisoner paying the 9*l.* ; a fresh demand being afterwards made on *Crowther* for a further sum claimed to be due from him on his surety-bond, the receipt was produced purporting to be for 12*l.*, and the figures written on an erasure, and the allegation on the part of the prosecution was, that after *Allatt* had signed the receipt, the prisoner had altered the figure from 9 to 12, induced so to do by a representation on the part of *Crowther* that he had previously paid 3*l.* to the club.

It appeared by the evidence that the receipt, after it was read aloud by *Allatt*, was in the hands of the prisoner sufficiently long to enable him to substitute the figures 12 for the figure 9, before he returned it to *Allatt* to be signed ; and the counsel for the prosecution contended that even if this was the fact, and the prisoner in that manner induced *Allatt* and *Goodall* to sign the receipt, believing it to be still a receipt for 9*l.* when he had in fact fraudulently altered it into a receipt for 12*l.*, this would constitute the crime of forgery ; and he cited 2 *Russell* on Crimes, 319. ; 2 *Deacon's* Crim. Law, 1402. ; but it was argued that this suggestion of the

prisoner's was not borne out by the evidence, or the probabilities of the case; and that there was sufficient evidence to warrant the jury in coming to the conclusion, that the prisoner had altered the figures after the signature by *Allatt* and *Goodall*.

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REGINA
v.
CHADWICK.

ROLFE B., in laying down the law to the jury, told them he was clearly of opinion that if they thought the alteration of the document was made before *Allatt* and *Goodall* signed it, such conduct on the part of the prisoner, however fraudulent, would not constitute the crime of forgery; his Lordship said he had last year had occasion to give that point much consideration in a case which occurred at *Durham*. (a)

Not guilty.

Pashley and *Pickering* for the prosecution.

Wortley, Hall, and *Wilkins* for the prisoner.

(a) See *R. v. Collins*, *antè*, p. 461.

LIVERPOOL.

Coram ROLFE B.

1844.
LIVERPOOL,
March 29.

LILLEY and Others, Assignees of BENNETT,
v. BARNESLEY and Another.

Where chattels are bailed to an artisan for the purpose of his executing certain work upon them, at an agreed price, the bailor may reclaim the chattels before such work is fully executed; and the bailee has only a lien upon them to the extent of what would be a fair price for so much of the work as has then actually been executed.

TROWER for fifteen printing rollers.

Pleas, Not guilty; 2. not possessed.

The bankrupt was a calico-printer at *Manchester*: the defendants carried on the business of machine-engravers at the same place. In the beginning of 1842 the bankrupt employed the defendants to engrave six patterns for him, each requiring to be engraved upon three rollers; for three of the patterns it was agreed that the bankrupt should pay 5*l.* each, for the other three 6*l.* each—in all 33*l.*—the bankrupt furnishing the drawings and the rollers. The drawings and fifteen of the rollers were accordingly furnished by the bankrupt. On the 17th of *March* a fiat in bankruptcy issued against him; and on the 22d of *March* (his bankruptcy not being then known) he called on the defendants, told them that his affairs were in an unsettled state, and that they had better, for the present, stop engraving the

rollers. At the time when this took place, five or six of the rollers had been engraved: the remainder not. There was also at that time a balance of 44*l.* due from the bankrupt to the defendants for engraving rollers on former occasions, and that balance was still remaining unpaid. The assignees, before the commencement of the present action, required the defendants to give back the rollers, making them a tender of 10*l.* for the work they had done upon them: the defendants refused to deliver up the rollers, and said their claim was larger than 10*l.* Evidence was given by the plaintiffs that 10*l.* was more than enough to cover the value of the work done on the five or six rollers that had been worked upon; and further, that, taking 33*l.* to be a fair price for engraving all the rollers (supposing they had all been engraved), 10*l.* was more than a proportionate sum for the rollers actually engraved.

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LILLEY
&
BARNESLEY.

Watson, for the defendants, insisted that they were entitled to keep possession of the rollers until the whole of the contract price (33*l.*) was paid; that it would be a great hardship on the artisan if it were thus competent for the employer to countermand his order at any period he thought proper, on merely tendering a proportionate part of the agreed price; for the artisan might have gone to considerable expenses in order to the full execution of his work, or he might have been forced to decline other business. He further said

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LILLEY
v.
BARNESLEY.

that he should prove that there was a general usage in *Manchester* for machine-engravers to have a general lien on the rollers placed in their hands to be engraved, and that the defendants were therefore justified in withholding the rollers until their former balance of 44*l.* was paid.

Martin, contra. The defendants have not any lien. It is the case of the bailment of a chattel with a contract between the bailor and the bailee for the execution of certain work upon the chattel. Until the full execution of the work, no lien attaches; and the owner of the chattel has in law the right to countermand his order, and reclaim the chattel, at any time, though by so doing he may subject himself to an action for breach of the contract. At all events, he has a right to have his chattel back on paying for the work which has been actually done. And as to the general lien, he denied the existence of it in point of fact.

Watson called witnesses in support of his allegation that machine-engravers had a general lien: but the evidence failed to prove it; he also called several witnesses, who swore that the work actually done on the rollers before the order was countermanded was reasonably worth 14*l.*

ROLFE B. (to the jury.) I agree with the plaintiff's counsel, that the bankrupt had a right at any time to stop the progress of the work which

he had ordered to be done upon his rollers, and that he was entitled to reclaim his chattels without being compelled to tender the full amount which he was to have paid for the entire work. But, on the other hand, I have no manner of doubt that before he can require the delivery of his chattels, he must at all events pay for the work which has actually been performed on them. The question then is, Have the plaintiffs tendered a fair compensation for the work actually done, in tendering the 10l.? and in deciding that question, I think you are not bound to be solely guided by the contract price agreed to be paid for the entire work (though that is a circumstance very material to be considered), but you are to say what would be a fair and reasonable sum for a machine-engraver to receive as the price of the work which was in fact executed?

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LILLEY
v.
BARNESLEY.

Verdict for the defendant.

Martin and Green for the plaintiff.

Watson for the defendant.

1844.

LIVERPOOL, CAZENOVE and Others Assignees of AL-
April 3. MOND a Bankrupt v. CLAYTON and Others.

The owner of a ship may verbally authorize a creditor to take possession of it as a lien, and the creditor so taking possession may enforce such lien without any alteration in the registry.

TROVER for two vessels and their certificates of registry.

Pleas, 1st. Not guilty ; 2d. Not possessed.

The bankrupt was the registered owner of two vessels ; the defendants were his bankers, and held his promissory note at twelve months for securing the balance of his account. Just prior to the note becoming due the bankrupt deposited with the defendants the bill of sale of one of the vessels, and the builder's receipt of the other. This was not done in pursuance of any application by the defendants, and nothing was said as to the possession of the vessels.

The bankrupt stopped payment in *March*, and the fiat issued in the subsequent month of *April*. The bankers, learning the situation of the bankrupt, applied to him before the issuing of the fiat to execute a mortgage of the vessels, which the bankrupt refused, saying it was too late, as he had stopped payment. The bankers said they had a right to the vessels and should take possession ; the bankrupt said they might do that, and he informed them where the vessels were.

In pursuance of what passed at this interview between the bankrupt and the defendants, the latter obtained from the captain possession of the vessels and their certificates.

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v.
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The bankrupt being called as a witness for the defendants, said, on cross-examination, that he did not at the interview in question mean to give to the defendants any new right, but merely that he considered that the deposit of the vessels' papers had already entitled them to take possession.

Watson objected that no legal right to hold the vessels could be conferred without compliance with the provisions of the Ship Registry Acts.

On the other side, it was admitted that no property in, or title to, the vessels could be gained without complying with the acts in question; but here, the defendants did not pretend to have acquired any property in the vessels: they merely asserted that they had a right to detain the vessels and their papers, from the legal owners, whoever they might be, until their debt was satisfied.

ROLFE B. It does not appear to me that the Ship Registry Acts have any application to a case where no right to the ship, either legal or equitable, is contended for. A ship-owner may certainly by word of mouth authorize another to keep possession of his ship, as of any other chattel; and if the jury think that the bankrupt, before his act of bankruptcy, authorized the defendants to take

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 v.
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 and Others.

and keep possession of the vessels as a security for the debt he owed them, they ought to find their verdict for the defendants; but if the bankrupt, thinking the defendants already had a right to take the ships, merely said they might exercise any right which they then had, and did not mean to confer any fresh authority, then I think the verdict should be for the plaintiffs.

Verdict for the plaintiffs.

Watson, Crompton, and Unthank, for the plaintiffs.

Martin and Segar for the defendants.

Shields v. Boucher.
1. de G. & Smale. 40.

1844.
 LIVERPOOL,
 April 4.

In a question of pedigree, when it is important to shew that the family had relatives living at a particular place, evidence may be given of declarations by a deceased member of the family, that "he was going to visit his relatives at that place."

RISHTON (Demandant) v. NESBITT (Tenant.)

THIS was a writ of right brought to recover certain lands in the county of *Lancaster*.

The demandant claimed as collateral heir to one *Barbara Aytoun*. The tenant relied on two fines levied by *Barbara Aytoun*; the first above sixty years before the commencement of this action, by which, and a deed to declare the uses of it, the seizure of *Barbara Aytoun* was divested; and the tenant shewed a derivative title under the parties in whose favour the fines were levied, and a long possession. The tenant also undertook to prove that another

party than the demandant was the heir of *Barbara Aytoun*. It became important for the tenant, in establishing the descent of this party from an ancestor of the name of *Nicholas Nabb* (a brother of *Barbara Aytoun*), to shew that a member of his family lived at *Blackburn*; and in order to shew that fact, *Starkie* asked a witness who had married into the *Nabb* family, whether she had heard her husband's father (who lived at *Manchester*), make any statement on that subject.

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The witness answered that, on occasion of his leaving his house at *Manchester*, she had heard him say he was going to visit his relatives at *Blackburn*.

Dundas objected that the declaration deposed to by the witness could not be received as evidence in this case. In cases of pedigree, the declarations of deceased members of the family had been admitted in evidence, where such declarations pointed to particular individuals as being members of the family; but there were two objections to the admissibility of the declaration now tendered: 1st, there was no precedent for receiving declarations so vague as to point to no particular individual; 2ndly, reputation as to a place where a thing occurred, is not evidence; it has been so decided in the case of a declaration as to the place of birth. (a)

(a) See *Rex v. The Inhabitants of Brith*, 8 East. 539.

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ROLFE B. The declaration is not evidence of the fact that the father of the witness's husband did go to *Blackburn*, or that any one of the name of *Nabb* was living there; but it is evidence of there being a tradition in the family, that they had relations living at *Blackburn*; and in the event of its being shewn by other evidence that there were persons of the name of *Nabb* living at *Blackburn*, this declaration may be referred to, to connect those persons with the family now spoken of. In the *Troutbeck* case (a) evidence was received of a tradition that a particular individual had died in *India*, for the purpose of connecting that individual with the family of the claimant.

The tenant made out his case satisfactorily, and in the result, the demandant submitted to a

Verdict for the tenant.

Dundas and *Archbold* for the demandant.

Starkie, *Crompton*, and *Tomlinson* for the tenant.

(a) *Monckton v. The Attorney-General*, 2 Russ. & Myn. 147—151.

BODMIN.

Coram, CRESSWELL J.

RICHARDS v. RICHARDS.

CASE for words spoken to one *A. B.* imputing to the plaintiff that he had grossly ill-treated a woman. The declaration alleged, generally, that the plaintiff had, in consequence of the slander, lost the friendship of his neighbours, &c.

Plea : Not Guilty.

The evidence on the part of the plaintiff, shewed that the words were spoken to *A. B.* on the occasion of his going to the defendant to enquire whether he had not imputed to the plaintiff the offence charged upon him, and who was the author of the slander? The defendant, in reply, stated that he had heard of the imputation; that the report was generally current, and that he had reason to believe it to be true; but he refused to state from whom he had heard it, and strongly censured the plaintiff.

On the part of the defendant, it was attempted to be shewn by cross-examination of the plaintiff's

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BODMIN,  
March 26.

In an action for defamation, where the defendant at the time of uttering the words had referred to certain reports current against the plaintiff, which he stated he had reason to believe were true : Held, that on plea of Not Guilty, the defendant might prove by cross-examination of the plaintiff's witnesses, that such reports had in fact prevailed in the plaintiff's neighbourhood, and were the common topic of conversation, before the words were uttered by the defendant.

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witnesses, that the supposed misconduct of the plaintiff had been a frequent topic of conversation among those who were employed by the plaintiff in his business, and was commonly rumoured in the town in which the plaintiff resided, before the conversation between the defendant and *A. B.*, which was the subject of the action; and such evidence was insisted upon as admissible, because it shewed that the defendant was, at all events, not the inventor of the slander, and that the injury arising from the slander could not be wholly ascribed to the defendant. *Moore v. Ostler*, and *Hardy v. Alexander*, referred to in *Roscoe on Evidence*, p. 398. (5th ed.), were cited.

On the other hand, it was contended that there was no reported authority in favour of the admission of mere rumours in mitigation, except where it appeared that the defendant had himself heard the rumours, and had founded his statement upon such reports of others.

CRESSWELL J. stated from his own recollection, that the case of *Hardy v. Alexander* was not a decision in point, for that the evidence was there received without opposition; but that in *Moore v. Ostler*, such evidence had been objected to and admitted.

After consulting WIGHTMAN J., the learned judge allowed the counsel for the defendant to prove the above facts on cross-examination.

*Greenwood*, for the defendant, in his address to the jury, urged them to find for the defendant, on the ground that the supposed slander being contained in a reply to enquiries made by the witness for the purpose of ascertaining the author of it, was *prima facie* a confidential and privileged communication, and that there was no proof of express malice.

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 v.  
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CRESSWELL J. It appears to me that the defendant has failed in shewing that he had any lawful excuse for the act complained of; the uttering of defamatory matter of an actionable nature is presumed to be malicious, unless it occurred on a lawful occasion. If the defendant had merely stated to the witness what he had heard, with a view to enable him to trace the slander to its real author, the case might have been different. But here the defendant went further, and he even refused to point out any one as the reporter to him, of the slander.

Verdict for the plaintiff.

*Crowder, Cockburn, and M. Smith* for the plaintiff.

*Greenwood and Rawlinson* for the defendant.





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A surgeon may administer medicines in the cure of a surgical case without being subject to the penalties of the *Apothecaries' Act* (55 G. 3. c. 194.), but he has no right to do so in the case of internal diseases not requiring surgical treatment, such as fever, or consumption. *The Master, &c. of the Apothecaries' Company v. Lotinga*, Page 495

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An appointment of an umpire by two arbitrators, under a power to appoint before "entering on the cause of the matters in difference," is good, though the arbitrators have, before such appointment, enlarged the time. If one of the arbitrators insist upon producing further evidence, and the other refuse to allow it to be done, this

is a sufficient "disagreement" between the arbitrators to authorise the interference of the umpire. *Cudliff v. Walters*, Page 232

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1. An order to refer an attorney's bill to taxation, and an allocatur thereon, after attendance on the master by the party's new attorney, are sufficient evidence of the business having been done, though there be not the usual undertaking to pay in the order. *Wilson v. Knapps*, 160
2. The official assignee of a bankrupt is liable to the costs of defending an action brought against him and the creditors' assignee, if he joined in retaining the attorney. *Sydney v. Belcher*, 324

**AUTREFOIS ACQUIT.**

An insolvent debtor acquitted on a former indictment for omitting

goods out of his schedule, may be again indicted for omitting other goods not specified in the former indictment; but such a course ought not to be taken except under very peculiar circumstances. *R. v. Champneys*, Page 26

**AUTREFOIS CONVICT.**

A plea of *autrefois convict* of an assault before Justices under 9 G. 4. c. 31., is a bar to an indictment for felonious stabbing, &c., in the same transaction. *The Queen v. John Walker*, 446

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**BANKER'S CHEQUE.**

The holder of a banker's cheque ought to present it for payment within a reasonable time; and it is a question for the jury on an issue of due presentment, whether this rule has been complied with. Where a cheque drawn on a country banker, dated 19th March, was not presented until 6th April, and no cause was assigned for the delay, but the drawer had not sustained loss by the non-present-

ment at an earlier period, the drawer was held liable to be sued on the cheque. *Serle v. Norton*, Page 401

**BANKRUPT,**

See PENALTY. WITNESS, 9.

1. By the custom of a bank money paid in after banking hours, was put into a separate place of deposit, and entered in a counter-book, but not carried to the customer's account till next day:—where a customer paid in a bank-note after the banking-hours, and the banker having before resolved not to open his bank again, placed the note in such separate place of deposit, without carrying it to the account of the customer, and next morning stopped payment, and became bankrupt, the bank-note was held to remain the property of the customer. *Sadler v. Belcher*, 489
2. Goods suffered by the true owner to remain in the possession of a trader, till after a secret act of bankruptcy, but taken possession of before the fiat, do not, since 2 & 3 Vict. c. 29., pass to the assignees. *Pariente v. Pennell*, 517

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## BIGAMY.

On a trial for bigamy, the prisoner's declarations, deliberately made, of a prior marriage in a foreign country, are sufficient evidence of such marriage, without proving it to have been celebrated according to the law of the country. *Reg. v. Newton*, Page 503

## BILL OF EXCHANGE AND PROMISSORY NOTE.

See **BANKER'S CHEQUE. FORGERY,**

## 1. INDICTMENT, 8.

1. An instrument drawn by *A.* upon *B.* requiring him to pay to the order of *C.* a certain sum at a certain time, "without acceptance," is a bill of exchange, and may be so described in an indictment for forgery. *The Queen v. Kinnear*, 117

2. A note written by a creditor, at the foot of an account, requesting the debtor to pay that account to *A. B.*, and which the creditor delivered to *A. B.*, for the purpose of his getting in the money for the creditor, is not a bill of exchange, or order for payment of money within the Stamp Act. *Norris v. Solomon*, 266

3. On replication *De injuriâ* to a plea by the acceptor of a bill, that it was accepted for the accommodation of the drawer, and by him indorsed to *A. B.* without

consideration, for the purpose of raising money, and by *A. B.* fraudulently indorsed to *C. D.*, without consideration, and by him to the plaintiff, without consideration, the defendant must prove the want of consideration from plaintiff to *C. D.* *Brown v. Philpot*, Page 285

4. In an action against the acceptor of a bill of exchange purporting to be drawn and indorsed by *A. B.*, proof that the bill was indorsed by the same person who drew it is sufficient, though that person is shown not to be *A. B.* *Joseph Smith v. Moneypany*, 317

5. A document in the ordinary form of a bill of exchange, but requiring the drawee to pay to his own order, and purporting to be indorsed by the drawer and accepted by the drawee, cannot in an indictment for forgery and uttering be treated as a bill of exchange. *Reg. v. J. Bartlett*, 362

6. An indorsee of a bill of exchange, ignorant of the drawer's address, and so unable to give him notice of the dishonour of the bill, is bound to make enquiry for the address promptly on the bill being dishonoured, if he means to hold the drawer liable. *Chapcott v. Curlewis*, 484

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CARRIER.

A town-carman, not conveying goods from any one known *terminus* to another, nor at any fixed rate, nor the goods of several persons at the same time, but plying in the streets, and undertaking jobs as he can get them, is not a common carrier. *Brind v. Dale*, Page 80

CHALLENGE.

On the trial of an indictment for a riot, it is ground for a prosecutor's challenging a Juror that he is an inhabitant of the town where the riot occurred, and that he has taken an active part in the matter which led to it. *The Queen v. Swain*, 112

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VOL. II.

COMMON, RIGHT OF.

A right of common for cattle "*ledent and couchant*," upon enclosed land, extends to such cattle as the winter catage of the land, together with the produce of it during the summer, is capable of maintaining. *Whitelock v. Hutchinson*, Page 205

CONCEALMENT OF BIRTH.

See INDICTMENT, 9.

1. In order to convict a woman under 9 G. 4. c. 31. s. 14. the body must be completely disposed of: a prisoner found with the body still in her possession, though about to dispose of it, cannot be convicted. *Reg. v. Sarah Snell*, 44
2. On an indictment for concealing the birth of a child, a final disposing of the body must be shewn; hiding the body in a place from which a further removal is contemplated will not support the indictment. *Reg. v. Emma Ash*, 294
3. On an indictment for child-murder, bad for not stating a name of the child, or accounting for the omission, no conviction for concealing the birth can take place. *Reg. v. Hicks*, 302

CONDITION.

Where directors of a company granted a lease, with a power of

Q Q

re-entry, and afterwards the company was incorporated by an act of parliament, which (amongst other things) enacted, "that all contracts, &c. theretofore entered into with the directors of the company shall be as valid and effectual, to all intents and purposes, as if the company had been incorporated when the same contracts, &c. were entered into, and as if the same had been entered into with the said incorporated company:" Held, that the incorporated company might support ejectment on the clause of re-entry. *Doe d. London Dock Co. v. Knebell et Uz.*, Page 66

### CONFESSION.

A constable telling a prisoner "any thing you can say in your defence we shall be ready to hear," renders a confession inadmissible. *Reg. v. Morton*, 514

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Where counsel, regularly retained, appear for the plaintiff in a penal action, and claim to proceed, the plaintiff himself cannot appear, and claim to be nonsuited. *Marks v. Benjamin*, Page 225

### COURT OF REQUESTS.

An act of parliament, establishing a local court, enacted that the mesne process might be served on the defendant either personally, or by leaving the same at the dwelling-house, lodging, or place of abode, &c. of the defendant. Held, that it was sufficient to leave the process at a lodging where the wife of the defendant was living, though the defendant himself, a seafaring man, was absent on a voyage, and had been so absent for six months. The act provided that the defendant, in any action commenced for anything done in pursuance of the act, or on account of any order, &c. of the court, might give the special

matter in evidence, under the general issue. Held, that this enactment protected not merely the officers of the local court, but also the plaintiff in the suit there, who had voluntarily accompanied and aided the officer in seizing the goods of his debtor, under an order of execution. *Culverson v. Melton*, Page 200

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1. In trespass for a battery, the provocation, though not arising at the time of the battery, may be given in evidence under Not Guilty in mitigation of damages. *Fraser v. Berkley*, 3
2. In an action on the case, where special damage is alleged in the declaration, and is essential to the maintenance of the action, such special damage may be traversed by the plea, and if not traversed

is admitted. *Perring v. Harris*, Page 5

#### DECLARATIONS.

See EVIDENCE, 2. 10. 12. 25.

#### DEFAMATION.

See LIBEL.

#### DEMURRAGE.

*Indebitatus assumpsit* will not lie for demurrage, unless there be an express contract to pay it. *Horn v. Bensusan*, 326

#### DEMURRER.

See EVIDENCE, 11. INDICTMENT, 5. PLEADING, 5.

#### DEPOSIT.

See LIEN.

#### DEPOSITIONS.

See EVIDENCE, 1, 24. INTERROGATORIES.

The depositions taken before the magistrates against a prisoner cannot be read against him, where the witness has died since the examination, unless the depositions in cross-examination have been correctly taken, and returned to the court. Depositions taken in cross-examination, at a subsequent time to those in chief, and not



signed by the committing magistrates, are so irregular as to prevent the whole depositions from being read against a prisoner ; and this, although both are proved by one of the committing magistrates to have been accurately taken. *Reg. v. Francis France*, Page 207

### DISORDERLY HOUSE.

The use of rooms in a licensed victualler's house for private balls, and public balls, and masquerades, on the speculation of persons hiring the rooms for the occasion, does not render the landlord liable to the penalty under 25 G. 2. c. 36. s. 2. *Marks v. Benjamin*, 225

### DISTRESS.

In case for an excessive distress, though the warrant of distress be for a greater sum than is really due, the plaintiff is not entitled to a verdict, unless the goods seized are excessive in regard to the sum really due. *Crowder v. Self*, 190

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### ELECTION.

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### EMBEZZLEMENT.

1. *Semble*. Larceny by a clerk in a public office under the crown is not within 7 & 8 G. 4. c. 29. s. 46. An indictment for embezzlement of moneys received by a clerk, whilst such, is good under the 2 W. 4. c. 4. without alleging the embezzlement to have taken place whilst the prisoner was clerk. *Reg. v. Lovell*, Page 236
2. An indictment on stat. 7 & 8 G. 4. c. 29. s. 49. against a broker for embezzlement of a security for money, must allege a written direction to him as to the application of the proceeds. *Reg. v. Golde*, 425

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1. Illegal questions or answers returned by commissioners appointed by the court under 1 *W. 4. c. 22.* for the *viva voce* examination of witnesses, may be objected to and struck out at the trial; but counsel cannot object to the answers to illegal questions put on his own side. *Hutchinson v. Bernard*, Page 1
2. On an indictment against a prisoner for the murder of *A.* by poison, which was also taken by *B.* who died in consequence: Held, that *B.*'s dying declarations are admissible. *Reg. v. Baker*, 53
3. In order to let in secondary evidence of a document, it is not necessary that the search for it should have been recent, or made for the purpose of the cause. A search amongst the proper papers three years before the trial of the cause was held sufficient. *Fitz. v. Rabbits*, 60
4. Evidence of the usage of trade is admissible to shew the meaning of ambiguous words in a packer's receipt for goods. *Bowman v. Horsey*, 85
5. Where the plaintiff puts in evidence letters of the defendant, selected out of a correspondence, the defendant is not entitled to put in the intermediate letters unless expressly referred to in those put in by the plaintiff. *Sturge v. Buchanan*, Page 90
6. If an answer in Chancery is produced in evidence, the party against whom it is produced is entitled to have the whole bill in Chancery read as part of his adversary's case. *Pennell v. Meyer*, 98
7. A receipt, given by the agent indorsed on the back of a writ as issuing it, for the sum claimed, is admissible to prove payment of that sum, between the same parties, without calling the agent. *Weary v. Alderson*, 127
8. The contents of a document refused to be produced after notice, cannot be proved by the production of a copy of a copy of the document. The first copy ought to be produced. *Everingham v. Roundell*, 138
9. When an ancient document, purporting to be an exemplification, is produced from the proper place of deposit, but has not, at the time of its production, the Great Seal affixed, it is still to be presumed that it is an exemplification, and may be read in evidence as such. *Mayor of Beverley v. Craven*, 140
10. A document deposited in a Court

of Equity, by a party to a suit there, and scheduled in his answer, but which remains with an officer of that court, after an order to deliver it to the party, is sufficiently in the control and power of such party to let in secondary evidence after notice to produce, and nonproduction thereof by the party.

In an action by a special administrator, under st. 38 G. 3. c. 87., the declarations of the executor named in the will, made by him whilst he was the acting executor, are not admissible against the plaintiff. *Rush v. Peacock*, Page 162

11. Where a plea has been demurred to, the defendant, on the trial of issues joined on other pleas, has no right to advert to the matters alleged in the plea demurred to, as matters admitted by the plaintiff though the *venire* be to assess the damages on the demurrer, as well as to try the issues. *Ingram v. Lawson*, 253

12. The declarations of a party suing as a representative of others, made before he became such, are evidence. *Smith*, assignee of *Morgan v. Morgan*, 257

13. On the trial of an indictment for personating a burgess at an election of a councillor for a ward of a borough divided into wards under the Municipal Corporations Act, it is enough for the prosecutor to shew that the personation took place at what purported to be a

ward-election for that ward. It is not necessary to prove the due division of the borough into wards, or that such division was approved of by the Privy Council. *Reg. v. Thompson*, Page 355

14. A declaration alleged the division of a parish into several distinct parishes by order of the king in council (under 58 G. 3. c. 45.): Held, that the allegation could not be proved by production of the Gazette containing a copy of such order. *Greenwood v. Woodham*, 363

15. In case for maliciously indicting the plaintiff, the observations made by the judge on the trial of the indictment are not evidence for the plaintiff. *Barker v. Angell*, 371

16. In trespass for false imprisonment on a criminal charge, the defendant cannot cross-examine as to the bad character of the plaintiff, nor as to previous charges made against him. *Downing v. Butcher*, 374

17. In an action to try whether the Queen, in right of the Duchy of Lancaster, has the right to appoint coroners for the duchy, the plaintiff insisting that in former times an officer of the duchy, called the *Feodary*, discharged the duties of coroner: Held, that a manuscript book written by one J. S. (a feodary in the reign of Queen *Elix.*), and purporting to contain an account of the duties of his office,

- and precedents relating thereto, was not receivable in evidence for the plaintiff, who claimed to be duchy-coroner, although such book had been kept in the duchy office, and referred to there as a book of authority. *Jewison v. Dyson*, Page 377
18. A decree of the Court of Arches for alimony is not admissible in evidence without proof of the proceedings in the suit.  
Where a suit is removed by appeal from a Consistory Court to the Court of Arches, the judgment of the Court of Arches is not admissible in evidence without shewing that court to be duly in possession of such suit by producing the process of appeal, viz. the transcript of the proceedings sent from the court below. *Leake v. Marquis of Westmeath*, 394
19. A summons for leave to pay money into Court is some evidence of a liability to that extent. *Lawson v. Mangles*, 427
20. A copy of a document taken by a machine, worked by the witness who produces it, is admissible as secondary evidence. *Simpson v. Thoreton*, 493
21. A warrant of commitment is not evidence of the facts which it recites. *Stevens v. Clark*, 435
22. On an issue as to the genuineness of a signature, if a witness denies the genuineness, and assigns as his reason a peculiarity in such signature, other documents exhibiting the same peculiarity may be put into his hands on cross-examination, and the witness may be questioned upon them, for the purpose of testing the value of his evidence as to the genuineness of the disputed signature. *Young v. Honner*, Page 536
23. An attorney having a lien on a deed for the costs of drawing it, is not bound to produce it on a *subpoena duces tecum*, for the client. *Kemp v. King*, 487
24. Where on a preliminary hearing of a case the magistrate's clerk had taken down what a witness said, but neither witness nor magistrate signed it: held that what the witness said might be proved by any one who heard him, without producing the clerk's note. *Jeans v. Wheedon*, 484
25. On an issue, whether the plaintiff had an easement in the defendant's land, the declaration of a former occupier of the defendant's land, is not admissible against him. *Scholes v. Chadwick*, 507

## EVIDENCE IN CONTRADICTION.

See PRACTICE (TRIAL), 5. RAPE, 2.

## EVIDENCE (IN REPLY).

See ALIBI.

The plaintiff in an action on the case gave, as confirmatory evi-

dence of the defendant's having committed the tort proved at *Layton*, proof that he was seen near the spot at the time in question, and the defendant called witnesses, who swore that the defendant was at *Richmond* at that time. The plaintiff was allowed to give in reply additional evidence of the defendant's being at *Layton*, such evidence being a direct contradiction of the new fact of the defendant's being at *Richmond*. *Briggs v. Ainsworth*, Page 168

#### EXEMPLIFICATION.

See EVIDENCE, 9.

#### FACTOR.

Where a factor, the consignee of goods for sale and indorsee of the bills of lading, had landed and warehoused the goods and taken the wharfingers' certificates and dock-warrants in his own name, and then pledged the certificates and warrants for an advance of money on his own account; held, that such pledge was not protected by the second section of 6 G. 4. c. 94., in an action of Trover by the real owner of the goods. *Close v. Holmes*, 22

#### FALSE IMPRISONMENT.

See EVIDENCE, 16.

#### FALSE PRETENCES.

1. Obtaining, as a loan, from the drawer of a bill accepted by the prisoner and negotiated by the drawer, part of the amount, for the purpose of paying the bill, under the false pretence, that the prisoner was prepared with the residue of the amount,—is an offence within 7 & 8 G. 4. c. 29. s. 53., the prisoner being shewn not to be so prepared, and not intending so to apply the money. *R. v. Crossley*, Page 17
2. A sailor's shipping note for 2l. 15s., payable to *A. B.* or bearer, five days after the ship shall sail, is not a void instrument, under 17 G. 3. c. 30., but is an "undertaking, warrant, or order for the payment of money," under 11 G. 4. & 1 W. 4. c. 66. s. 3. Therefore, where such an instrument was forged and goods obtained by means of it, it was held that the prisoner ought to have been indicted for forgery; and that an indictment for obtaining goods by false pretences could not be sustained. *Reg. v. Anderson*, 469

#### FORCIBLE ENTRY.

Where the grand jury at the assizes find a true bill for a forcible entry under stat. 8 Hen. 6. c. 9., the judge before whom the indictment is found is not bound to

award a writ of restitution upon the finding. He has a discretion whether to grant it or not. *Reg. v. Harland*,  
Page 141

### FORGERY.

See BILL OF EXCHANGE 1, 5. INDICTMENT, 8. FALSE PRETENCES, 2.

1. To constitute the forgery of a bill of exchange, within 1 *W.* 4. c. 66. s. 4., the instrument must be complete. Forging an acceptance to an instrument in the form of a bill, but without the drawer's name, is not within the statute. *Reg. v. Butterwick*,  
196
2. It is not forgery fraudulently to procure a party's signature to a document, the contents of which have been altered without his knowledge. *Reg. v. Joseph Chadwicke*,  
545
3. It is not forgery fraudulently to induce a person to execute an instrument on a misrepresentation of its contents. In an indictment for forgery, the instrument forged may be described as a *deed* without setting it out, or averring facts to shew that it was such a deed as might be the subject of larceny. *Reg. v. Richard Collins*,  
461
4. On an indictment for uttering a forged cheque, &c., it is sufficient to disprove the handwriting of the

supposed maker; and he need not be called to disprove an authority to others, to use his name; circumstances shewing guilty knowledge are enough. *Reg. v. Hurley*,  
Page 473

### FRAUDS (STATUTE OF).

A memorandum of sale of goods in the vendor's book, signed by the vendee in initials, the vendor's name not appearing in the book, is not a sufficient note in writing to satisfy the Statute of Frauds; nor will the defect be cured by a letter from the vendee, in which the vendor's name does appear, unless the letter clearly refers to the memorandum. *Jacob v. Kirk*,  
221

### FRAUDULENT CONVEYANCE.

A bill of sale of goods, executed by a debtor to his creditor, is not void by reason of preference given over other creditors. If intended by the parties really to operate and to give the creditor the power of taking possession, it is good although not acted on by taking possession. *Eveleigh v. Purssord*,  
539

### GAME.

1. In an indictment under 9 *G.* 4. c. 69. s. 9., it is sufficient to charge

entering, &c. certain land in the occupation of *A. B.*, &c. without specifying whether it was inclosed or not. If one of a party of poachers be found in the land specified, the rest co-operating in the pursuit of game in adjoining land, all may be alleged to be found in the land specified. *Reg. v. Andrews*,

Page 37

2. The mere use of a small stick as a weapon by a poacher, in a sudden affray with game-keepers, is not enough to prove such stick an offensive weapon under 9 G. 4. c. 69. s. 9. The jury must be convinced that the party took it with him for the purpose of offence. *Reg. v. Fry & Webb*,

42

#### GAZETTE.

See EVIDENCE, 14.

#### GRAND JURY.

See INDICTMENT, 14.

#### HANDWRITING.

See EVIDENCE, 22.

#### HIGHWAY.

See REPUTATION, 2.

1. The Judge on the trial of an indictment for the non-repair of a

highway, found at sessions under 5 & 6 W. 4. c. 50. s. 95., has no power to award costs for a frivolous defence, under the 98th section. The power is limited to the court at which the indictment was preferred. *Reg. v. The Inhabitants of Preston*,

Page 137

2. An indictment for the non-repair of a highway describing the way as immemorial, is not supported by proof of a highway extinguished, as such, sixty years before, by an enclosure act, but since used by the public, and repaired by the district charged. The 28d section of 5 & 6 W. 4. c. 50. is not retrospective in respect of roads completely public by dedication at the time of the act; it applies to roads then made and in progress of dedication. *Reg. v. Westmark (Tything of)*,

305

3. On an indictment for the non-repair of a highway, in the ordinary form, a parish cannot be convicted for not rebuilding a sea wall washed away by the sea, over the top of which the alleged way used to pass.

Where a parish are acquitted on such an indictment, on the ground of there being no highway, the court is not bound to award costs under 5 & 6 W. 4. c. 60. s. 95. A judge who tries *at nisi prius* an indictment for non-repair, removed by *certiorari*, has no power under

that section to award costs. *Reg. v. Paul (Inhabitants of)*, Page 307

4. An indictment for the non-repair of a highway in the parish of *A.*, alleging the liability by reason of the tenure of certain lands in the said parish, is not supported by proof of a liability to repair a way extending through *A.* and other parishes by reason of the tenure of a farm made up of lands in *A.* and the other parishes. *Reg. v. Mizen*, 382
5. A judge at nisi prius is empowered by stat. 5 & 6 *W. 4. c. 50. s. 95.* to make an order for payment of the costs of the prosecution, though the indictment had been removed from the sessions by *certiorari*. *Reg. v. Inhabitants of the Township of Great Broughton*, 144
6. Where an indictment for non-repair of a highway is directed by Justices under 5 & 6 *W. 4. c. 50. s. 95.*, the prosecutor is entitled to an order for costs, though the defendants are acquitted on the ground that the road is not a highway. *Reg. v. The Inhabitants of Heanor*, 445

INDEBITATUS ASSUMPSIT.

See DEMURRAGE.

INDICTMENT.

See ASSAULT. AUTREFOIS CON-

VICT. AUTREFOIS ACQUIT. BILLS OF EXCHANGE, 1, 5. CONCEALMENT OF BIRTH. EMBEZZLEMENT. FALSE PRETENCES. FORGERY. HIGHWAY, 2, 3, 4. PLEADING, 5. RAILWAY. RECEIVING STOLEN GOODS. UTTERING.

1. An indictment which alleges an offence in the reign of a deceased king, and concludes against the peace of his successor, is still bad on demurrer. After judgment on demurrer an indictment cannot be quashed at the instance of the prosecutor. *Reg. v. William Smith*, Page 109
2. An indictment under 7 & 8 *G. 4. c. 29. s. 15.* for stealing in a shop, &c., must allege that the prisoner stole the goods *therein*; an averment that the goods were in the shop, and the prisoner stole them, is not enough. *Reg. v. Roger Smith*, 115
3. An indictment for forging a receipt in the following form: —  

“6th January, 1830.  
 “£16: 15: 6. For the High Constable,  
 “James Hughes,”

 does not require explanatory averments. *Reg. v. Boardman*, 147
4. Where two receivers are charged in the same indictment with separate and distinct acts of receiving, it is too late after verdict to object that they should have been indicted separately. *Reg. v. Hayes. Walter & Another*, 156



5. Objections to an indictment, which are within 7 G. 4. c. 64. s. 20, 21., must be taken by demurrer. It is too late to take them on the trial. *Reg. v. Law*,  
Page 197
6. An indictment beginning "The Jurors of our Lady the Queen" is not bad in arrest of judgment. The words "of our Lady the Queen" may be rejected as surplusage, the jurors intended being those mentioned in the caption. *Reg. v. Turner*, 214
7. An indictment charging an offence on a day within the present reign, and concluding against the peace of her Majesty, is not supported by proof of an offence on a day in a former reign; and the objection entitles the prisoner to an acquittal. *Reg. v. Pringle*, 276
8. An indictment under stat. 11 G. 4. and 1 W. 4. c. 66. for uttering a forged foreign promissory note, need not allege it to be payable out of England. *Reg. v. John Lee*, 281
9. An indictment for concealing the birth of a child, "by secretly disposing of the dead body," without shewing the mode of disposing of the dead body, is bad. *Reg. v. Hounsell*, 292
10. In an indictment for the murder of a bastard child, the absence of a name is sufficiently accounted for by the child being described as "then lately before born of the body of "J. H." *Reg. v. Mary and Jane Hogg*, 380
11. On an indictment for carnally knowing and abusing a girl under ten years, the prisoner may be acquitted of the felony and convicted of an assault. *Reg. v. Folkes*,  
Page 460
12. An indictment alleging that A., B., C., D., &c., persons employed in a mine, in the parish of, &c., in the county of Cornwall, &c., at, &c., did steal certain ore, the property of the adventurers in the said mine, then and there being found, does not sufficiently shew the ore to have been in the mine when stolen under the 2 & 3 Vict. c. 58. s. 10. *Reg. v. Trevenner and Treleage*, 476
13. An indictment for burning a stable is not supported by proof of burning a shed which had been built for and used as a stable originally, but had latterly been used as a lumber shed only. *Reg. v. Colley and Others*, 475
14. Where the grand jury has ignored a bill of indictment, a second bill may be presented at the same assizes against the prisoner for the same offence. *Reg. v. Newton*, 503
15. In setting out a judgment for felony, it is not sufficient to allege that at the sessions of gaol delivery, &c. "it was presented" &c. without saying by whom, and on oath &c. *Reg. v. Butterfield*, 522
16. It is in the discretion of the Judge whether he will allow se-

veral felonies to be given in evidence under one indictment; where they are in fact so mixed as not to be separated without inconvenience, it will be allowed.

When the stealing is in county Y. and the receiving in county L., both are triable in Y., and the indictment may allege both the stealing and receiving to have been in Y. *Reg. v. Hinley*, Page 524

17. On an indictment under 1 Vict. c. 85. for feloniously administering poison, the prisoner cannot be convicted of an assault under the 11th s. of the statute. *Reg. v. Dilworth*, 531

#### INSOLVENT DEBTOR.

See AUTREFOIS ACQUIT.

#### INSURANCE.

See SHIP, 1.

1. A new ship was chartered and insured from *London* to *N. S. Wales*, and the freight made payable on her arrival there. Being unable to procure homeward freight, she went to *Madras* and there took in freight to *England*, and a fresh policy was entered into. The ship was lost on the homeward voyage; the route being a common one for ships chartered to *New South Wales*: Held, that the ship was

on her first voyage, and that consequently the underwriters were not entitled to a new-for-old deduction of one-third. *Pirie v. Steele*, Page 49

2. A party whose life is insured is not the general agent for the assured: and therefore the policy is not void by reason that such party failed to communicate a material fact, as to which he was not interrogated by the insurers, unless he was aware of the materiality of the fact, and studiously concealed it.

It is a question of fact for the jury whether a fact, not communicated, was under the circumstances one which the assured ought to have communicated. *Rawlins v. Desborough*, 328

#### INTEREST.

See WITNESS, 2, 3. 5, 8, 9.

#### INTERROGATORIES.

1. The depositions of a witness examined on interrogatories are admissible, though it appears that on his examination he referred to papers which he refused to allow the commissioners to see. *Steinkeller v. Newton*, 372
2. In order to let in the deposition of a witness examined on interrogatories, his absence must be shewn by some one who can speak

to the fact, of his own knowledge:—proof of enquiries made at the residence of the witness, and of answers given, is not enough. *Robinson v. Marks*, Page 375

3. The deposition of a witness examined on interrogatories, jointly interested with the defendant, may be read in evidence for the defendant, the name of the deponent being indorsed on the record, under stat. 3 & 4 W. 4. c. 42. s. 27. *Adams v. Garrard*, 400

#### ISSUES SEVERAL.

See PRACTICE (TRIAL), 6.

#### JOINT STOCK COMPANY.

1. Where a member of a joint-stock company advanced money to a director of the company, knowing that it was to be applied in taking up a bill of exchange which such director had become a party to, for the purposes of the company,—it is a question for the jury whether the member advanced the money on the credit of the company at large, or on that of the director individually. *Colley v. Smith*, 96
2. A member of a joint stock company is not liable to be sued for the price of goods ordered by the company to be made for them before he became a member, although such goods were delivered

afterwards. *Whitehead v. Barron*, Page 248

#### JUDGMENT.

See EVIDENCE, 18.

#### JURY.

See PRACTICE. (TRIAL), 14. CHALLENGE.

1. Special jurors are to be paid by the party who moved for the special jury, though (to ensure a trial) the other party may have summoned them. *Wilson v. Butler*. *Same v. Hoadley*, 78
2. In a special jury cause the plaintiff may have a *tales* without the consent of the defendant. *Galliff v. Bourne*, 100

#### LANDLORD AND TENANT.

See CONDITION. DISTRESS. MESNE PROFITS. NOTICE TO QUIT.

1. Where the only evidence of a tenancy is payment of rent, the person paying is in all cases at liberty to explain the payment, and to shew on whose behalf it was received. *Doe d. Harvey v. Francis*, 57
2. Where A. took a lease in writing in his own name of certain premises, and subsequently occupied

part only, and paid rent for so much as he occupied to *B.*, as whose agent he in fact took the lease: Held, that *B.* might distrain for the part so occupied, and that *A.* was precluded in replevin from disputing his title. *Clarke v. Waterton*, Page 87

3. A covenant by a lessee "to put premises into habitable repair" binds him to put them into such a state that they may be occupied not only with safety, but with reasonable comfort, for the purposes for which they were taken. *Belcher v. McIntosh*, 186

## LEVANT AND COUCHANT.

See COMMON.

## LIBEL AND SLANDER.

1. The order of the House of Commons for the publication and sale by certain booksellers, of Reports laid before the House, does not exempt the booksellers from answering in an action of libel, any individual injured by defamatory matters in such Reports so sold by them. *Stockdale v. Hansard*, 9
2. A letter from a son-in-law to his mother-in-law, volunteering advice respecting her proposed marriage, and containing imputations upon the person whom she was about to marry, is a privileged communication, and not actionable

unless malice be shewn. *Todd v. Hawkins*, Page 20

3. In an action for a libel contained in a newspaper, the defendant has a right to have read, as part of the plaintiff's case, another part of the same newspaper referred to in the libel complained of. *Thornton v. Stephen*, 45
4. A porter who in the course of his business delivers parcels containing libellous hand-bills, is not liable in an action for libel, if he be shewn to be ignorant of the contents of the parcels. *Day v. Bream*, 54
6. In an action against the editors of a newspaper for libel, the fact of the libel being published on the communication of a correspondent is not admissible in mitigation of damages. *Talbot v. Clark*, 312
7. In an action for libel against the publisher of a magazine, evidence of the writer's personal malice against the plaintiff is inadmissible. *Robertson v. Wylde*, 101
8. An action will lie for saying of the plaintiff "he is a returned convict," though the words import that the punishment has been suffered. *Fowler v. Dowdney*, 119
9. In an action for defamation, where the defendant at the time of uttering the words had referred to certain reports current against the plaintiff, which he stated he had reason to believe were true; Held, that on plea of not guilty the de-

fendant might prove in mitigation by cross-examination of the plaintiff's witnesses, that such reports had in fact prevailed in the plaintiff's neighbourhood, and were the common topic of conversation before the words were uttered by the defendant. *Richards v. Richards*, Page 555

10. An action will not lie against a magistrate for words spoken in pronouncing judgment of a witness in the case. *Kendillon v. Malkby*, 438

#### LIEN.

See SHIP, 2. EVIDENCE, 23.

1. Where a debtor deposits a title deed with his creditor, as security for a debt, the interest which the creditor thereby acquires in the deed may be assigned by him to a third person. *Hobson v. Mellond*, 342
2. Where chattels are bailed to an artisan for the purpose of his executing certain work upon them, at an agreed price, the owner may reclaim the chattels before such work is fully executed; and the bailee has only a lien upon them to the extent of what would be a fair price for so much of the work as had then actually been executed. *Lilly v. Barnsley*, 548

#### LIGHT.

An actual enjoyment of lights for

twenty years, even under a permission verbally asked for by the occupier of a house, and given by the person having right to obstruct, is sufficient to confer a right under 2 & 3 W. 4. c. 71. s. 3. The enjoyment under that section need not be as of right, or adverse. *Corporation of London v. Pewterer's Company*, Page 409

#### LIMITATION OF ACTION.

Where the overseers of a township claimed lands which they had allowed a poor inhabitant to occupy rent free, he keeping up a grindstone upon the land for the convenience of the parish; the enjoyment of this privilege by the parishioners, for upwards of twenty years, whilst the lands were occupied by persons paying no rent, does not defeat the title of such persons under 3 & 4 W. 4. c. 27. *Doe d. Robinson v. Hinde*, 441

#### LOCAL COURTS.

See COURTS OF REQUEST.

#### MAGISTRATE.

See LIBEL AND SLANDER, 10.

**MALICIOUS PROSECUTION.**

See EVIDENCE, 15.

1. In case for a malicious arrest, the plaintiff is entitled to recover costs incurred in the former suit beyond the taxed costs in that suit. *Gould v. Barratt*, Page 171
2. Where, in case for a malicious charge of felony, the plaintiff puts in, to prove a formal part of his case, the defendant's and another person's depositions before the magistrates, the defendant has a right to use his own deposition as evidence in the cause, but not that of the other deponent. *Jackson v. Bull & Alison*, 176

**MALICIOUS SHOOTING,  
CUTTING, &c.**

1. The fact of firing a gun into a room of *A. B.*'s house with intent to shoot *A. B.*, the prisoner supposing him to be in the room, will not support a charge of shooting at *A. B.*, if he be shewn not to be in the room, or within reach of the shot. *Reg. v. Lovell*, 39
2. An indictment under 9 G. 4. c. 31. s. 12. for maliciously shooting at *A. B.* is supported if he be struck by the shot, though the gun be aimed at a different person. A prisoner who employed another person to harbour the principal felons may be convicted as accessory after the fact though he him-

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self does no act of relieving, and the prisoner may be found guilty on the uncorroborated testimony of the person who actually harboured. *Reg. v. Jarvis*, Page 40

3. Where a party having a deadly weapon lawfully in his possession, in his own defence, but without having previously retreated as far as possible, cuts a person who is assaulting him, he is guilty of felony, under 1 Vict. c. 85. s. 4., if he intended grievous bodily harm. *Reg. v. Odgers*, 479

**MALPRACTICE.**

See MANSLAUGHTER.

**MANSLAUGHTER.**

If a medical man, though lawfully qualified to practise as such, cause the death of a person by the grossly unskilful, or grossly incautious, use of a dangerous instrument, he is guilty of manslaughter. *Reg. v. Spilling*, 107

**MARRIAGE.**

See BIGAMY.

**MASTER AND SERVANT.**

Where a master entrusts his servant with his carriage for a given pur-

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pose, and the servant drives it for another purpose of his own, in a direction different from that ordered by his master, and in so doing negligently drives over a person, the master is liable for such negligence. *Heath v. Wilson*,

Page 181

### MESNE PROFITS.

On the trial of an ejectment by landlord against tenant, where the defendant appears, the plaintiff may, under 1 G. 4. c. 87., recover for mesne profits without proving notice of trial. *Doe d. Thompson v. Hodgson*,

283

### MINES (STEALING IN).

See INDICTMENT, 12.

### MISDEMEANOR.

- . A party arrested during the assizes under an indictment for a misdemeanor cannot be discharged on bail without pleading and traversing. *Reg. v. Wettenhall*,

291

### MUNICIPAL ELECTION.

See EVIDENCE, 13.

### MURDER.

1. Where a wound is wilfully, and without justifiable cause, inflicted,

and ultimately becomes the cause of death, the party who inflicted it is guilty of murder, though life might have been preserved if the deceased had not refused to submit to a surgical operation. *Reg. v. Joseph Holland*,

Page 351

2. Sentence of death may, since the stat. 6 & 7 W. 4. c. 30., be recorded against a person convicted of murder. *Reg. v. Hogg*,

381

### NEGLIGENCE.

See MASTER AND SERVANT.

#### PLEADING, 3.

The owners of a vessel disabled by the negligence of its crew are answerable for damage done by its accidentally drifting, when so disabled, against another vessel. *Secombe v. Wood*,

290

### NEW ASSIGNMENT.

See PLEADING, 2.

### NON-JOINDER.

See PRACTICE (RIGHT TO BEGIN), 9.  
PRACTICE (TRIAL), 12. SHIP, 1.

### NOTICE TO PRODUCE.

See PRACTICE (TRIAL), 8. EVIDENCE, 10.

1. A notice to produce "all and every letters written by the plain-

tiff to the defendant, relating to the matters in dispute in the action," is sufficient to let in secondary evidence of a particular letter, though it do not specify the date of such letter. *Jacob v. Lee*, Page 33

2. A notice to produce in a town cause, served the evening before the trial at the residence of the attorney too late for the attorney to communicate with his client, is not in time to let in secondary evidence. *Byrne v. Harvey*, 89
3. In an action for work and labour, a notice to produce "all accounts relating to the matters in question in this cause," is sufficient to let in secondary evidence of an account of work done, given by the plaintiff to the defendant, without specifying it by date or otherwise. *Rogers v. Custance*, 179
4. A notice to produce all letters written by the one party to, and received by the other, between the years 1837 and 1841 both inclusive, held sufficient to call for a particular letter. *Morris v. Hauser*, 392

#### NOTICE TO QUIT.

An agent to receive rents and let has authority to determine a tenancy. In ejectment a person defending as landlord is bound by the same estoppel as the tenant in possession. *Doe d. Earl Manvers v. James Mixem and another*, 56

#### OFFICIAL ASSIGNEE.

See ATTORNEY'S BILL, 2.

#### ORDER FOR PAYMENT OF MONEY.

See BILLS OF EXCHANGE, 2. FALSE PRETENCES, 2.

#### ORE STEALING.

See INDICTMENT, 12.

#### PEDIGREE.

See REPUTATION.

#### PENAL ACTION.

An action on 2 *W. & M. c. 5.* to recover treble damages for pound breach, is not a penal action within 21 *Jac. 1. c. 4. s. 4.*; and since the new rules the defendant cannot dispute the matters alleged in the declaration by way of inducement, without a special plea. *Casileman v. Hicks*, Page 422

#### PENALTY.

Only one penalty can be recovered against the same party under 6 *G. 4. c. 16. s. 120.*, though there may be different acts of concealment and different acts may be given in evidence on one count.



*Seemle*, a creditor of the bankrupt may be liable to the penalty, though a fraudulent preference was intended. *Brooks v. Glen-cross*,  
Page 62

### PERSONATION.

See EVIDENCE, 13.

### PETITIONING CREDITOR.

See WITNESS, 8, 9.

### PEWS.

The churchwardens have a discretionary power to appropriate the pews in the church amongst the parishioners, and may remove persons intruding on seats already appropriated. *Reynolds v. Monkton*,  
384

### PLEADING.

See BILLS OF EXCHANGE, 3. COURT OF REQUESTS. DAMAGES, 2. DEMURRAGE. INDICTMENT. PENAL ACTION. SHIP, 1.

1. In trespass, a recovery of damages against a co-trespasser not sued is not admissible in mitigation of damages under the plea of not guilty. *Day v. Porter*,  
151
2. In trespass where a justification is pleaded to which the plaintiff

new assigns that the action is brought for another and different trespass than that mentioned in the plea, and not guilty is pleaded to the new assignment; if the plaintiff gives in evidence only one trespass, it is incumbent on him to shew that the trespass so given in evidence is clearly a different one from that mentioned in the plea. If the circumstances are alike, the jury ought to consider it to be the same. *Darby v. Smith*.  
Page 184

3. In an action on the case for negligent driving, where the defendant's possession of the carriage, alleged to have been negligently driven, is stated in the declaration by way of inducement, such possession is admitted by the plea of Not Guilty. *Emery v. Clark*,  
260
4. The plaintiff, on a replication of the Statute of Limitations to a plea of set-off, cannot on the trial reduce the amount of the set-off by shewing payment of part; the payment of part ought to have been replied. *Moore v. Wood*,  
407
5. A prisoner cannot of right demur and plead over to an indictment for felony. A prisoner will not be allowed to withdraw his plea of not guilty, for the purpose of taking a mere technical objection. *Reg. v. Odgers*,  
479
6. A plea of *non cepit* in replevin does not put the plaintiff to proof

of property. *Dover v. Rawlings*,  
Page 544

PLEDGE.

See FACTOR. LIEN, 1.

POACHING.

See GAME.

POISONING.

See INDICTMENT, 17.

An indictment for causing poison to be taken by *A. B.*, with intent to murder *A. B.*, is not sustained by evidence shewing that the poison, although taken by *A. B.*, was intended for another person. *Reg. v. Mary Ann Ryan*, 213

POSSESSION.

See TRESPASS.

POUND BREACH.

See SHERIFF. PENAL ACTION.

PRACTICE.

See COUNSEL. EVIDENCE, 1, 3. EVIDENCE (IN REPLY). LIBEL, 3. NOTICE TO PRODUCE. SEVERAL COUNTS. SUBPENA. VENUE.

(ADMISSIONS.)

A deed agreed to be admitted on a judge's order, made on a summons

describing it as a counterpart, cannot be objected to at the trial as an original for want of the stamp as such, it being properly stamped as a counterpart. *Doe d. Wright v. Smith*, Page 7

(AMENDMENT.)

1. The record may be amended at *Nisi Prius*, by adding a count which was in the declaration and issue delivered, *Ernest v. Brown*, 13
2. A *Nisi Prius* record to which a *venire*, *distringas* and pannel are annexed, may be withdrawn at *Nisi Prius*, and amended by indorsing on the *distringas* the execution thereof, and re-entered. *Masters v. Lewis*, 59

(COUNSEL.)

Where a prisoner is defended by counsel he has no right to make two statements to the jury, one by himself, the other by his counsel. *Reg. v. Burrows*, 124

(RIGHT TO BEGIN.)

1. Declaration on a policy of insurance averred that the person insured was in good health; plea, that he was in bad health, with a verification. Replication, that he was in good health, as averred in the declaration, and concluding to the country. Held, that plaintiff has the right to begin. Only

- one counsel on each side is to be heard on the claim of right to begin, and the counsel for the defendant has the right to reply. *Rawlins v. Desborough*, Page 70
2. Where the substantial question to be tried is the existence of a custom, affirmed by the defendant, he is entitled to begin, although the plaintiff's counsel alleges that he seeks to recover real damages. *Bastard v. Smith*, 129
  3. On issues joined in an action on a charterparty, "that the defendant did furnish sufficient cargo," and "that plaintiffs refused, after notice, to receive the cargo offered," the plaintiff is entitled to begin. *Ridgway v. Ewbank*, 217
  4. Where it can be collected from the pleadings and statements of counsel, that substantial damages are the object of an action, the plaintiff has the right to begin, though all the issues are on the defendant. *Hoggett v. Oxley*, 251
  5. In an action on the warranty of a horse, the plea alleging that the horse was sound, and issue joined thereon, the plaintiff is entitled to begin. *Osborn v. Thompson*, 254
  6. Declaration on a policy of insurance alleged that the same was effected in pursuance of a declaration by the plaintiff, averring, amongst other things, that the party whose life was insured was not accustomed to any habits prejudicial to health, and was in a sound state of health, and the policy was to be void in case of misrepresentation. Pleas. 1st, that the party was accustomed to habits prejudicial to health, to wit, of drunkenness. 2d, that the party was in a bad and unsound state of health. Replication, *De Injuriâ*. Held, that the defendant was entitled to begin. *Pole v. Rogers*, Page 287
  7. On an issue from the Court of Chancery, to try whether A. B. was at a certain time of sound mind, the plaintiff affirming the soundness is entitled to begin. In such issues it will be presumed that the party ordered to be plaintiff was intended to begin. *Frank v. Frank*, 314
  8. Where the affirmative of any one material issue is on the plaintiff, and he undertakes to give evidence upon it, he is entitled to begin. *Rawlins v. Desborough*, 328
  9. *Semble*, on the trial of an issue of non-joinder of another defendant in an action for goods sold, the defendant is entitled to begin. He is so entitled if he admits the amount of the debt. *Bonfield v. Smith*, 519
- (RIGHT TO REPLY.)
1. *Semble*, if two prisoners are indicted jointly for the same offence, and one call witnesses, the counsel for the prosecution is entitled to a general reply. But if the

offences are separate, and they might have been separately indicted, he must in his reply confine himself to the case of the party who has called witnesses. *Reg. v. Hayes, Walter, and Others*,

Page 155

2. Counsel for prisoners in felony have no right to give the prisoner's statements of the facts. A statement of facts not intended to be proved gives a reply to the counsel for the prosecution. *Reg. v. Butcher*,

228

(SEVERAL DEFENDANTS.)

1. In trespass against several defendants, where upon proof of trespasses affecting different defendants, the counsel for the plaintiff elects to proceed on the trespasses affecting two only of the defendants, he cannot afterwards proceed (even as against those defendants) on other trespasses affecting all the defendants. — The defendants against whom the counsel abandons the case ought not to be acquitted till the special pleas in which they have joined are disposed of. *Hitchen v. Teale*, 30
2. In an action of trespass against several defendants, the plaintiff having proved one trespass committed by some of the defendants, and another trespass committed by other defendants, is bound to elect, before the defendants open their

case, against which defendants he will proceed. *Howard v. Newton* and others,

Page 509

(TRIAL.)

1. The counsel calling a witness who has given unfavourable evidence on cross-examination, may, on re-examination, ask him questions to show inducements to betray the party who has called him. *Dunn v. Aslett*,

Page 122

2. When the plaintiff at the assizes is compelled to withdraw his record on account of the non-arrival of his witnesses on his cause being called on, a judge will allow the record to be re-entered on the arrival of the witnesses, unless it be shown by affidavit for the defendant that his witnesses have been dismissed. *Lean v. Smyth*,

126

3. Where a witness in cross-examination denies having used particular expressions in the presence of the parties, the opposite counsel examining a person to contradict the witness is not at liberty to lead by reading from his brief the words denied; the conversation spoken to by the first witness being evidence in itself. *Hallett v. Cousens*,

238

4. Where a plaintiff in ejectment makes out a *prima facie* case as heir at law, and is answered by a will being set up for the defend-

- ant, he is at liberty, in reply, to put in a subsequent will, whereby the estates claimed were devised to him. *Doe d. Charles Gosley v. Gosley*, Page 243
5. In an action on a warrant, where the horse warranted is exhibited to the jury in the presence of witnesses during the defendant's case, the plaintiff cannot call veterinary witnesses attending the view to give their then opinion, he having had the opportunity of inspection before closing his case. *Osborn v. Thompson*, 254
6. In trespass *quare clausum fregit*, where there are several issues, and amongst them one on the plaintiff's possession of the close, the plaintiff has a right to a trial of all the other issues, though it appears on the opening of the evidence that he was not in possession of the close. *Fry v. Monckton*, 303
7. A witness called under a mistake of counsel as to his being able to speak to a transaction, is not liable to cross-examination, though sworn, if the mistake be discovered before any question is put. *Wood v. Mackinson*, 273
8. Where a party refuses to produce a document after notice, and secondary evidence is in consequence given, he cannot afterwards put in the document as part of his own case. *Doe d. Thompson v. Hodgson*, 283
9. On the trial of an issue directed by the Court of Chancery, to try whether the plaintiff was the next of kin of *J. S.* (with the usual order for indorsing any special matter on the record), one defendant, *A. B.*, claimed to be as nearly related to *J. S.* as the plaintiff was; the other defendant, *C. D.*, set up a claim inconsistent with the cases both of the plaintiff and *A. B.* Held, that at the close of the plaintiff's case, *C. D.* should not only open but prove his case, and that then *A. B.* should do the like, the plaintiff having the general reply on both. *Sarah Phillips v. Willetts*, Page 319
10. The counsel calling a witness who gives adverse testimony cannot on re-examination ask whether the witness had not given a different account to the attorney. *Winter v. Butt*, 357
11. Where a document is called for after notice to produce by the plaintiff, the defendant may during the plaintiff's case produce evidence to shew the document lawfully out of his possession, and such evidence is solely for the judge to determine whether secondary evidence be admissible, and gives the plaintiff's counsel no reply to the jury. *Harvey v. Mitchell*, 366
12. On the trial of a cause it is in the discretion of a judge to say in what order the counsel for different defendants, having different

interests, shall cross-examine and address the jury. The order of seniority is not imperative.

*Fletcher v. Crosbie*, Page 417

13. Where a witness remains in court after an order that the witnesses shall leave the court, his testimony cannot on that ground be excluded; it is only matter for observation on his evidence. *Chandler v. Horne*, 423

14. Where a juryman on a criminal trial is taken so ill as to be unable to continue, another juryman may be sworn with the eleven already on the trial, and the case proceed, the witnesses already heard being recalled. *Reg. v. Beere*, 472

(PUTTING OFF TRIAL.)

A motion to put off a trial on an indictment for felony, cannot be entertained till after plea pleaded. It is a good ground for putting off a trial that the panel of jurors at the present assizes has been taken from a neighbourhood where an excitement has been raised against the prisoner likely to prevent a fair trial. *Reg. v. Bolam*, 192

PRESCRIPTION ACT.

See LIGHT.

In trespass, upon issue joined whether the defendant had for thirty years enjoyed as of right a certain privilege, &c., upon the plaintiff's

land, the plaintiff, in order to raise the presumption that the enjoyment was permissive, may give in evidence an old lease made to the defendant's predecessor, and expiring immediately before the commencement of the thirty years, whereby the lessee was entitled to the privilege, &c., during the term. It is not necessary in such a case for the plaintiff to reply the lease specially under 2 & 3 W. 4. c. 71. s. 5. *Clay v. Thackeray*, Page 244

PRINCIPAL AND AGENT.

See FACTOR. NOTICE TO QUIT.

PRIVILEGED COMMUNICATION.

See LIBEL AND SLANDER, 1, 2, 9, 10.

PRISONER'S COUNSEL.

See PRACTICE (COUNSEL). PRACTICE (RIGHT TO REPLY), 2.

PUBLIC DOCUMENT.

See EVIDENCE, 17.

RAILWAY.

A party is liable to be indicted under st. 3 & 4 Vict. c. 97. s. 15. if

he designedly places on a railway substances having a tendency to produce an obstruction of the carriages, though he may not have done the act expressly with that object. *Reg. v. Holroyd*, Page 339

### RAPE.

1. On a trial for rape, or attempt to commit a rape, the female assaulted may be confirmed by proof that she recently after the alleged outrage made a complaint, but the particulars of what she said cannot be asked in chief of the confirming witness, but may in cross-examination. *Reg. v. Walker*,  
212
2. On a trial for rape, the prosecutrix having on cross-examination denied that she had had connection with other men than the prisoner, those men may be called to contradict her. *Reg. v. Robins*,  
512

### RATIONE TENURÆ.

See REPUTATION, 2.

### RECEIPT.

See INDICTMENT, 3.

### RECEIVING STOLEN GOODS.

See INDICTMENT, 4. 16.

Where *A.*, knowing that goods have been stolen, directs *B.*, his servant,

to receive them into his premises, and *B.*, in pursuance of that direction, afterwards receives them in *A.*'s absence, *B.* knowing that they had been stolen, they may be jointly indicted for receiving them. *Reg. v. Parr and others*,  
Page 346

### RECORD (RE-ENTERING).

See PRACTICE (TRIAL), 2.

### RE-ENTRY.

See CONDITION.

### RE-EXAMINATION.

See PRACTICE (TRIAL), 10.

### REFRESHING MEMORY.

See WITNESS, 7.

### RELEASE.

See STAMP.

### RENT.

See LIMITATION OF ACTION.

### REPLEVIN.

See PLEADING, 6.

### REPLY (RIGHT TO).

See PRACTICE.

REPUTATION.

1. The declarations of an illegitimate member of a family respecting his illegitimate brothers are not admissible as reputation. *Doe d. Bamford v. Barton*, Page 28
2. Evidence of reputation is not admissible to shew a liability in the occupiers of land to repair a road, *ratione tenuræ*. *Reg. v. Wavertree, Inhabitants of*, 353
3. In a question of pedigree, where it is important to shew that the family had relatives living at a particular place, evidence may be given of declarations by a deceased member of the family that "he was going to visit his relatives at that place." *Rishton v. Nesbitt*, 552

RESTITUTION (WRIT OF).

See FORCIBLE ENTRY.

REVERSIONER.

A reversioner cannot sue for the obstruction of a right of way, unless the obstruction be such as either permanently injures the estate, or operates in denial of the right. *Hopwood v. Schofield*, 34

REWARD.

See TRANSPORTATION.

RUNNING DOWN.

See NEGLIGENCE.

SELF DEFENCE.

See MALICIOUS SHOOTING, &c., 3.

SERVICE OF PROCESS.

See COURT OF REQUESTS.

SESSIONS (ORDER OF).

Where an appeal against an order for payment of money under the *Lighting and Watching Act* is duly entered at the sessions, and afterwards dismissed, after hearing counsel, on the ground that notice of the appeal had not been given to the magistrates making the order, though it had been given to the inspectors, the sessions cannot award costs to the respondent, *the matter of the appeal not having been heard and determined*. *Reg. v. Wilkinson*, Page 431

SET OFF.

See PLEADING, 4.

SEVERAL COUNTS.

When a count on an account stated is joined with another count, the plaintiff, having only one cause of



action, and that applicable to both counts, must elect on which to take his verdict. *Shires v. Burrow*,  
Page 405

#### SEVERAL DEFENDANTS.

See PRACTICE (SEVERAL DEFENDANTS). PRACTICE (TRIAL, 9. 12.).

#### SEVERAL ISSUES.

See PRACTICE, (TRIAL), 6.

#### SEVERAL OFFENCES.

See INDICTMENT, 4. 16.

#### SHERIFF.

Where a bailiff in possession of goods under a landlord's distress, receives a *fi. fa.* from the sheriff, and sells the goods under it, the sheriff is liable in an action for pound-breach and rescue, at the suit of the landlord. *Reddell v. Stowey*,  
358

#### SHIP.

See DEMURRAGE, NEGLIGENCE.

1. *A* is registered owner of certain shares of a ship, the remaining shares belonging to *C.* and *D.*, his partners in trade, according to their interests in the general pro-

perty of the partnership. Held, that *A.* alone could not maintain an action for money had and received against the defendant, an insurance broker, to recover his proportion of proceeds of a policy of insurance effected by the defendant on the ship. *Brown v. Bradford*,  
Page 413

2. The owner of a ship may verbally authorize a creditor to take possession of it as a lien, and the creditor so taking possession may enforce such lien without any alteration in the registry. *Cazenove v. Clayton*,  
550

#### SHIPPING NOTE.

See FALSE PRETENCES, 2.

#### SIMONY.

In debt for penalties under 31 *Eliz. c. 6.* for a simoniacal contract to present, the declaration alleged a contract by the clerk to buy the advowson, if he were presented to the living, and a presentation in pursuance of such contract: held that proof of presentation was essential to the action, and that for that purpose it was not enough to shew that the defendant prepared a presentation, and tendered it to the bishop's secretary, but which never was in fact used or acted upon, the clerk having been after-

wards instituted on his own petition as equitable owner of the advowson. *Greenwood v. Woodham*, Page 363

## SLANDER.

See LIBEL.

## SOUNDNESS.

See WARRANTY, 1, 2, 3.

## SPECIAL PLEADER.

*Semble*, an action cannot be supported against a certificated special pleader, for negligence, or unskilful advice, in the course of his profession. *Perring v. Rebutter*, 429

## STABLE.

See INDICTMENT, 13.

## STAMP.

See PRACTICE, 1. BILLS OF EXCHANGE, 2.

A release executed by several commoners, of their separate rights of common over the same waste, in an action touching the extent of the waste is sufficient to make them all competent witnesses, though there be only one stamp. *Carpenter v. Buller*, 298

## STANNERS.

The stanners of *Devonshire* are not entitled by custom to divert water from streams into their mines, and for that purpose to dig trenches over other people's lands. *Bastard v. Smith*, Page 129

## STATUTES.

29 *Car.* 2. c. 3. s. 17. (Statute of Frauds), 221  
 2 *W. & M.* c. 5. (Pound Breach), 422  
 25 *G.* 2. c. 31. s. 2. (Keeping disorderly House), 225  
 17 *G.* 3. c. 30. s. 1. (Notes, &c. for less than 5*l.*), 469  
 38 *G.* 3. c. 87. (Special administrator), 162  
 1 *G.* 4. c. 87. s. 2. (Recovering Mesne Profits), 283  
 4 *G.* 4. c. 54. s. 3. (Threatening letter), 296  
 5 *G.* 4. c. 84. s. 22. (Reward for discovering transported felon at large), 279  
 6 *G.* 4. c. 94. (Factor's Act), 22  
 6 *G.* 4. c. 74. ss. 20, 21. (Objections to Indictment after Verdict), 197  
 7 & 8 *G.* 4. c. 29. s. 15. (Stealing in a warehouse), 458  
 7 & 8 *G.* 4. c. 29. s. 46. (Embezzlement), 236  
 7 & 8 *G.* 4. c. 29. s. 49. (Embezzlement), 425  
 7 & 8 *G.* 4. c. 29. s. 53. (False pretences), 17  
 7 & 8 *G.* 4. 29. s. 15. (Indictment

- for Stealing in a Shop or Warehouse), Page 115. 458
- 7 & 8 G. 4. c. 29. s. 7. (Threatening to accuse), 14
- 9 G. 4. c. 31. s. 14. (Concealing birth), 44. 294
- 9 G. 4. c. 31. s. 12. (Malicious shooting), 39, 40
- 9 G. 4. c. 31. s. 27. (Summary conviction for Assault), 446
- 9 G. 4. c. 69. s. 9. (Poaching), 37. 42
- 11 G. 4. & 1 W. 4. c. 66. s. 3. (Forgery of Undertaking to pay Money), 469
- 11 G. 4. & 1 W. 4. c. 66. s. 30. (Uttering forged foreign Promissory Note), 281
- 2 W. 4. c. 4. (Embezzlement), 236
- 2 W. 4. c. 45. s. 58. (False answer by Voter), 72
- 2 W. 4. c. 34. s. 7. (Joint utterance of counterfeit Coin), 219
- 2 & 3 W. 4. c. 71. s. 5. (Prescription Act), 244
- 3 & 4 W. 4. c. 27. (Limitation of Actions), 441
- 3 & 4 W. 4. c. 42. s. 27. (Indorsing name of Witness), 103. 400
- 3 & 4 W. 4. c. 90. (Lighting and Watching Act), 431
- 5 & 6 W. 4. c. 50. s. 95. (Costs of indicting Highway), 137. 307. 444
- 5 & 6 W. 4. c. 50. s. 23. (Dedication of Way), 305
- 7 W. 4. & 1 Vict. c. 85. s. 11. (Convicting of Assault on Indictment for Felony), 460. 531
- 1 Vict. c. 85. s. 2. (Indictment for poisoning), 213

- 1 Vict. c. 85. s. 4. (Felonious cutting), Page 479
- 2 & 3 Vict. c. 58. (Stealing ore), 476
- 3 & 4 Vict. c. 97. s. 15. (Obstructing Railway), 339

### SUBPCENA.

A witness is not bound to obey a subpcena altered by the attorney from the sittings for which it was originally sued out to subsequent sittings without being re-sealed. Whether a subpcena has been served in reasonable time before the trial is matter for the court. Service on a person living close to the place of trial, at half past eleven o'clock in the morning, for a cause called on at two o'clock, is not in sufficient time. *Barber v. Wood*, 172

### SUBPCENA DUCES TECUM.

See WITNESS, 1. 6.

### SUBSCRIBING WITNESS.

1. An unproved will, more than thirty years old, coming from the possession of one of the family of the testator, may be read without accounting for the subscribing witnesses, though the person producing it be not strictly entitled to the custody. *Doe d. Wildgoose v. Pearce*, 240
2. Where the subscribing witness to

an instrument has become blind, the instrument cannot be proved without calling him. *Crank v. Frith*, Page 262

3. A deed executed in the presence of a subscribing witness proved to be abroad at the time of the trial, is admissible on proof of the witness's writing, notwithstanding the power to examine on interrogatories under 1 *W.* 4 c. 22. s. 4. *Glubb v. Edwards*, 300

SUMMONS.

See EVIDENCE, 19.

TALES.

See JURY, 2.

THREATENING TO ACCUSE,  
&c.

The threatening to accuse under 7 & 8 *G.* 4. c. 29. s. 7. need not be a threat to accuse before a judicial tribunal; a threat to charge before any third person is enough. *Rex v. Robinson*, 14

THREATENING LETTER.

Sending a letter to *A. B.* threatening to burn a house of which he is owner, but let by him to, and occupied by, a tenant, is not an

offence within the 4 *G.* 4. c. 54. s. 3. *Reg. v. William Burridge*, Page 296

TRANSPORTATION (RETURN-  
ING FROM).

The judge before whom a prisoner is tried for returning from transportation has power to order the county treasurer to pay the prosecutor the reward under 5 *G.* 4. c. 84. s. 22. *Reg. v. Emmons*, 279

TRAVERSING.

See MISDEMEANOR.

TRESPASS.

See PLEADING, 1, 2.

In trespass, on pleas of, 1. Not Guilty, and 2. That the goods were not the goods of the plaintiff, and issues thereon, the defendant cannot set up property in a stranger, under whom he does not justify, in answer to the plaintiff's possession. *Carter v. Johnson*, 263

TRIAL.

See PRACTICE.

### UTTERING COUNTERFEIT COIN.

1. Where one of two persons in company utters counterfeit coin, and other counterfeit coin is found on the other person, they are jointly guilty of the aggravated offence, under 2 *W. 4. c. 34. s. 7.*; if acting in concert, and both knowing of the possession. *Reg. v. John Gerrish and Elizabeth Brown*, Page 219
2. If two persons jointly prepare counterfeit coin, and then utter it at different shops, apart from each other, but in concert and intending to share the proceeds, the utterings of each are the joint utterings of both, and they may be convicted jointly. *Reg. v. Charles Hurse and Charles Dunn*, 360

### VARIANCE.

See SIMONY. HIGHWAY, 2, 4.

### VENDOR AND PURCHASER.

See FRAUDS (STATUTE OF).

1. A condition of sale, "that if any mistake shall be made in the description of the premises, or any other error whatever shall appear in the particulars of the property, such mistake or error shall not annul the sale, but a compensation shall be given, &c." does

not apply where any substantial part of the property turns out to have no existence, or cannot be found; or where the vendor has *malâ fide* given a very exaggerated description of the property. The purchaser may in such a case rescind the contract *in toto*. *Robinson v. Musgrove*, Page 92

2. A policy of insurance on the life of *A.* had been assigned to the plaintiff: the defendant having privately ascertained that *A.* was dangerously ill, treats with the plaintiff for the purchase of the policy for a small sum, representing it as the then value of the policy, the plaintiff not being aware of *A.*'s illness. Held, that the sale was void, and that the plaintiff might recover the value of the policy in an action of trover. *Jones v. Keene*, 348

### VENUE.

When the venue is before plea brought back to the original county, on an undertaking to give material evidence in that county, the undertaking is satisfied by evidence in that county, going to support any traversable allegation in the declaration. *Lawson v. Mangles*, 427

### VICE.

See WARRANTY, 3.

VOTER.

Where a party, registered amongst the voters for a county, as a 50l. occupier, had ceased before the election to occupy the premises for which he was so registered, but had entered on the occupation of other premises of equal value,—such party has no right to vote. *Reg. v. Dodsworth*,

Page 72

WAREHOUSE.

A cellar used merely for the deposit of goods intended for removal and sale, is a warehouse within 7 & 8 Geo. 4. c. 29. s. 15. *Reg. v. W. Hill and Another*,

458

WARRANT OR ORDER TO PAY MONEY.

See *BILLS OF EXCHANGE*, 2. *FALSE PRETENCES*, 2.

WARRANTY.

See *PRACTICE (TRIAL)*, 5.

1. A slight disorder on a horse at the time of a sale, not calculated permanently to diminish his usefulness, and from which he ultimately recovers, is not an unsoundness constituting a breach of the warranty. *Bolden v. Brogden*,

113

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2. A cough, at the time of the sale of a horse warranted sound, is an unsoundness and breach of the warranty, though it be afterwards cured without any permanent injury to the horse. *Coates v. Stephens*,

Page 157

3. Crib-biting, which has not yet produced disease, or alteration of structure, is not an “unsoundness,” but is a “vice,” under a warranty that a horse is “sound” and free from “vice.” *Scholefield v. Robb*,

210

WINDOW.

See *LIGHT*.

WITNESS.

See *SUBPŒNA. PRACTICE (TRIAL)*, 1. 3. 7. 10. 13.

1. A witness is not bound to produce, in obedience to a subpœna, a will which he holds as attorney for a devisee claiming under it; although it be suggested that it is a will of personalty, as well as of realty, and ought therefore to be deposited in the Ecclesiastical Court. *Doe d. Carter v. James*,

47

2. Where a witness would be liable to indemnify the defendant not only against the damages and costs to be recovered by the plaintiff, but also against the de-

S S

- defendant's own costs, he is not competent for the defendant, nor can he be made so by indorsement on the postea under the statute 3 & 4 W. 4. c. 42. s. 26. *Stanley v. Jobson*, Page 103
3. Where a defendant justified a trespass to chattels by a plea, alleging them to be the property of *J. S.*, and that he committed the trespass by the command of *J. S.*: held, that *J. S.* was not a competent witness for the defendant, and that he could not be rendered competent by indorsing the postea under stat. 3 & 4 W. 4. c. 42. s. 26. *Green v. Warburton*, 105
4. Where a witness gives on cross-examination unfavourable testimony to the party calling him, and on re-examination denies having given a different account of the matter so spoken to, the party calling him has no right to discredit him by shewing he had given such different account. *Holdsworth v. The Mayor of Dartmouth*, 153
5. In an action *ex contractu*, a defendant who has suffered judgment by default, is not a competent witness for the plaintiff against other defendants who plead to the action. *Green v. Sutton*, 269
6. A witness called on his subpoena *duces tecum*, who objects to the production of documents, has no right to have the question of his liability to produce argued by his counsel retained for that purpose. *Doe d. Rowcliffe v. Earl of Egmont*, Page 386
7. Where a witness had been examined before Commissioners of Bankrupt shortly after the act of bankruptcy, *Semble*, that he may refer to the deposition he then made, for the purpose of refreshing his memory as to the date. *Smith assignee of Morgan v. Morgan*, 257
8. In an action brought by a bankrupt against his assignees, to try the validity of the fiat, the petitioning creditor is not a competent witness to prove the debt due to him, although he has assigned it over to a third person. *Carruthers v. Graham*, 368
9. In an action against the assignees of a bankrupt for seizing goods alleged to have been assigned to the plaintiff by the bankrupt before his bankruptcy, the bankrupt is a competent witness for the plaintiff, to prove that the assignment was made for a valuable consideration, and in consequence of pressure, although the defendants rely on the assignment as constituting in itself an act of bankruptcy.
- In such action, where no notice has been given of disputing the trading, act of bankruptcy, or petitioning creditor's debt, the petitioning creditor (having assigned his debt, and executed a release to the as-

signees) is a competent witness for them to prove an act of bankruptcy prior to that on which the adjudication took place, for the purpose of over-reaching the alleged assignment to the plaintiff.

*Smith v. Groom,* Page 388

10. Where on the trial of an issue *devisavit vel non*, from the Court

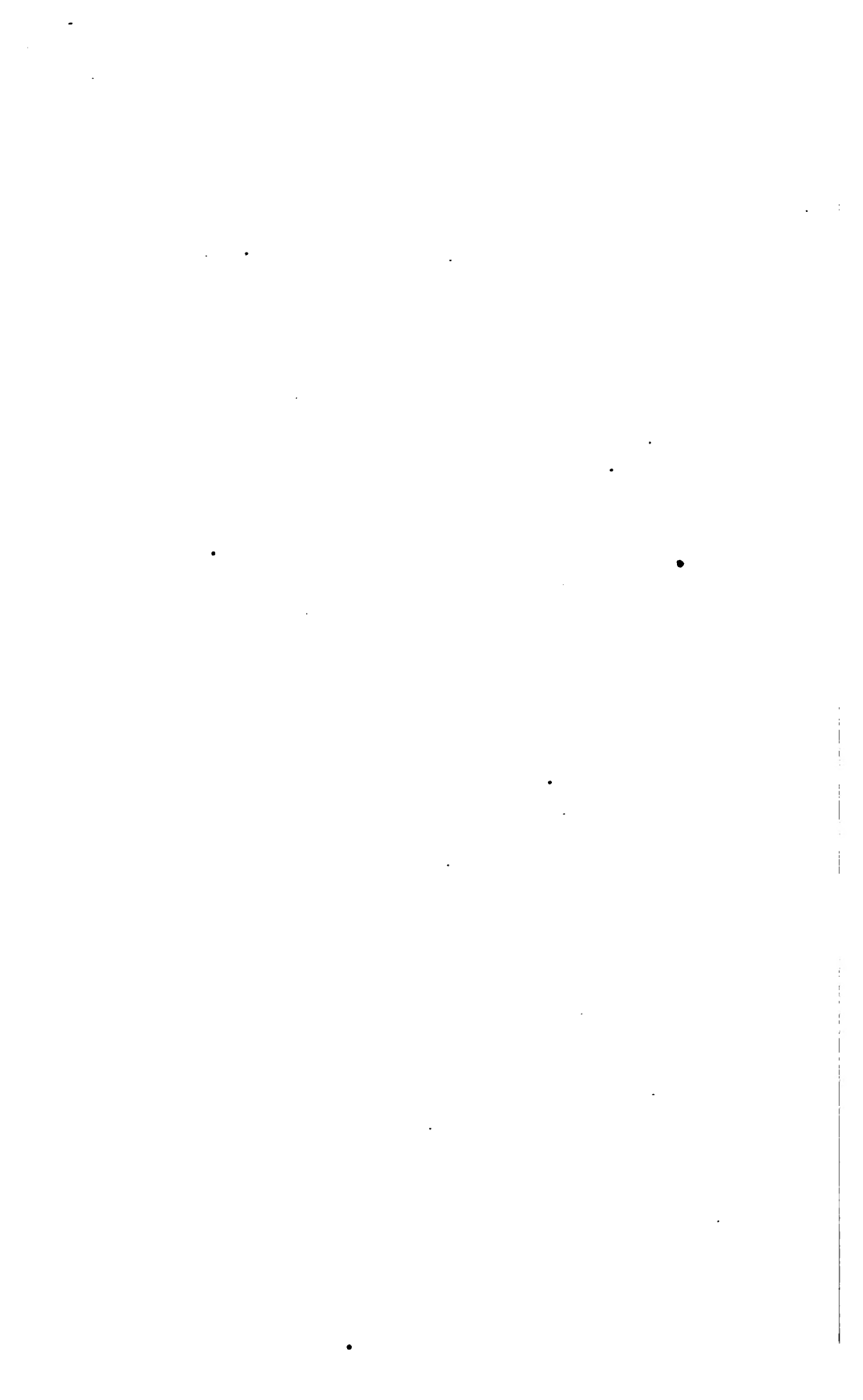
of Chancery, the plaintiff, in obedience to the rule of that court, calls the second attesting witness, who gives evidence adverse to the plaintiff, the counsel of the plaintiff may put questions to him in the nature of a cross-examination.

*Bowman v. Bowman,* Page 501

END OF THE SECOND VOLUME.



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